THE BEHRING SEA ARBITRATION.

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Letters to The Times *by its Special Correspondent:*

TOGETHER WITH THE AWARD.

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LIST OF ARBITRATORS, COUNSEL, AND SECRETARIES.

The Tribunal of Arbitration was constituted as follows:—

H.E. the Baron ALPHONSE DE COURCEL, Senator of France, nominated by France: *President.*

H.E. the Marquis E. VISCONTI VENOSTA, Senator of Italy, nominated by Italy.

H.E. Monsieur GREGERS GRAM, Minister of State of Sweden and Norway, nominated by Sweden and Norway.

The Right Hon. Lord HANNEN, Lord of Appeal; and

The Hon. Sir JOHN THOMPSON, K.C.M.G., Prime Minister of the Dominion of Canada, nominated by Great Britain.

The Hon. JOHN M. HARLAN, Justice of the Supreme Court of the United States; and

The Hon. JOHN T. MORGAN, Senator of the United States, nominated by the United States.

The Agents were—

The Hon. CHARLES H. TUPPER, Minister of Marine and Fisheries of the Dominion of Canada, on behalf of the Government of Great Britain.

The Hon. JOHN W. FOSTER, on behalf of the Government of the United States.

The British Behring Sea Commissioners were—

Sir GEORGE BADEN-POWELL, K.C.M.G., M.P.

Dr. GEORGE DAWSON, C.M.G.

The United States Behring Sea Commissioners were—

Mr. Thomas C. Mendenhall.
Mr. C. Hart Merriam.

The British Counsel and Staff were as follows:—

Sir Charles Russell, Q.C., M.P., Her Majesty's Attorney General.
Sir Richard Webster, Q.C., M.P., late Attorney-General.
Mr. Christopher Robinson, Q.C. (of the Canadian Bar).
Mr. M. H. Box, Barrister-at-Law.
Mr. R. P. Maxwell, of the Foreign Office, Assistant Agent.
Mr. John Anderson, of the Colonial Office.
Mr. Charles Russell (of the firm of Messrs. Day and Russell), Solicitor to the Agent.
Mr. Ashley Froude, C.M.G., Secretary to the British Behring Sea Commissioners.
Mr. J. Pope, Secretary to the Agent.
Mr. F. T. Piggott, Barrister-at-Law, Secretary to the Attorney-General.
Mr. J. Macoun, Secretary to Dr. Dawson.

The United States Counsel and Staff were as follows:—

The Hon. Edward J. Phelps.
Mr. John T. Carter.
The Hon. H. W. Blodgett.
Mr. F. R. Coudert.
Mr. Lansing, Associate Counsel.
Mr. William Williams, Associate Counsel.
Major Halford, Executive Officer.
Mr. Stanley Browne, Secretary to the United States Behring Sea Commissioners.
Mr. Hubbard Smith.
Mr. F. Coudert, Jun.
Mr. Coughlin.

The Secretaries of the Tribunal were as follows :—

Mons. IMBERT, Secretary.
Mr. A. BAILLY-BLANCHARD, and
Mr. H. CUNYNGHAME, Barrister-at-Law; Co-Secretaries.
Mons. le Chevalier BAJNOTTI,
Mons. HENRI FEER,
Mons. le Vicomte DE MANNEVILLE, and
Mons. LIEBERT; Assistant Secretaries.

The Private Secretaries to the Arbitrators were as follows :—

Mons. le Vicomte DE MANNEVILLE, to the Baron de Courcel.
Mons. le Chevalier BAJNOTTI, to the Marquis Venosta.
Mr. H. CUNYNGHAME, and
Mr. H. HANNEN, to the Lord HANNEN.
Mr. DOUGLAS STEWART, to Sir John Thompson.
Mr. LEWIS, to Mr. Justice Harlan.
Mr. F. JONES, to Senator Morgan.

Messrs. CHERER, BENNET, and DAVIS, of London, were appointed Shorthand-writers to the British Agent; and

Messrs. CHAMEROT, of Paris, were appointed Printers.

INTRODUCTION.

In August, 1886, without any previous protest or warning, the Government of the United States seized the British schooners "Carolena," "Onward," and "Thornton" in Behring Sea, which were then engaged in pelagic sealing there.

The "Carolena" was seized in latitude 55° 50′ north, longitude 168° 53′ west; the "Onward" in latitude 54° 52′ north, longitude 167° 55′ west, and the "Thornton" in about the same latitude and longitude as the "Carolena." These schooners were, at the time of their respective seizures, at a distance of more than 60 miles from the nearest land, St. George and Unalaska Islands. After capture they were taken by the United States' revenue-cutter "Corwin" to Unalaska. They were tried before Judge Dawson, of the United States' District Court of Sitka, and the masters and mates of the vessels were fined in a considerable sum, and, in addition, sentenced to a term of imprisonment. The vessels, meanwhile, were detained.

On receipt of intelligence of these seizures, Sir L. S. Sackville West, British Minister at Washington, at once made enquiries; and by the instructions of Her Majesty's Government, on the 21st October, 1886, he entered a formal protest against these seizures of British vessels.

Mr. Bayard, the Secretary of State, wrote, on the 3rd February, 1887, to Sir L. S. Sackville West, announcing the discharge of the vessels, and the release of all persons under arrest, adding that this order was issued "without conclusion of any questions which may be found to be involved in these cases of seizure."

The men in custody were released under circumstances of great hardship, being turned adrift, without means, in a place many hundreds of miles from their homes.

On the 12th April, 1887, Mr. Bayard wrote that Regulations

and Instructions to Government vessels were being framed, and that he would, at the earliest possible date, communicate with Sir L. West; but without any such communication being made fresh seizures took place in July and August of 1887, and renewed protest was made by Great Britain.

No seizure was effected in 1888, though pelagic sealing by British vessels was pursued in that year in Behring Sea.

In 1889 five British ships were seized in Behring Sea, and three others were peremptorily ordered out of the Sea.

In 1890 no seizures were made, though pelagic sealing was still carried on in Behring Sea.

The Government of the Queen remonstrated against the high-handed action of the United States as without warrant of law, and as an unjustifiable invasion of the rights of British subjects. But the correspondence has been carried on by them with an earnest desire to avoid recourse to measures of force in retaliation for those adopted by the United States, and in the confident belief that their rights would be surely and effectively vindicated by pacific methods, and just redress obtained for the wrongs committed.

As the result of prolonged negotiation and discussion the Treaty of Arbitration, from which this Tribunal derives its authority, was entered into, and on the 18th of April, 1892, the Convention or *modus vivendi* (intended to cover the period which might elapse before the award of the Arbitrators) was concluded.

Hence it is that now, and for the seventh time in the course of the present century, the Governments of Great Britain and of the United States appear before an International Tribunal of Arbitration.

* * * * * * * * * *

The position which Her Majesty's Government have consistently maintained on the subject of Regulations may be briefly stated as follows:—

So long as the claim of the United States to impose Regulations on pelagic sealing is based on the assertion of a legal right, that claim is strenuously opposed, and the right as strenuously denied.

But when the question is put on the lower and practical plane of common benefit to all the nations interested, on the recognition of the right of the pelagic sealer as well as of that of the island

sealer, then the British Government will cordially co-operate in giving effect to such measures as may be found necessary for the preservation of the fur-seals.

On this basis the question assumes the negation of the right which the United States now claim, and admits the necessity for the concurrence of Great Britain. Her Majesty is, and always has been, ready to concur in Regulations just and equitable in the interests of all concerned; but she has been unable to join in the consideration of Regulations based on the principle that the United States have a legal right to the protection which those Regulations are intended to give.

Should any Regulations be the outcome of this Arbitration, it is confidently expected by Her Majesty's Government that they will be such as not to protect only the United States in the manner which their present contention urges, but to protect an industry in which all the nations of the world have an interest.

It were useless to make Regulations which should bind only the citizens and subjects of the United States and Great Britain. As in the case of the Jan Mayen fisheries, so in the case of the Pacific fisheries, the subjects of all the nations who now participate in them, or who may be reasonably expected to do so, ought to be equally bound.

Her Majesty's Government cannot leave this subject without expressing regret and disappointment at the position apparently assumed by the United States on the question of Regulations. It is discussed by the United States as if the exclusion of all the other nations of the world from a share in the fur-seal industry in the western seas were to be the aim and purpose of such Regulations. Her Majesty's Government absolutely dissent from this view, and feel confident this Tribunal will not approve it. If the existing rights of nations are to be abridged, they can justly be abridged only in the interests of all, and the United States of America must be prepared to do their part by the adoption of Regulations and improved methods on the islands to preserve the fur-seals.

Finally, the broad contentions of the respective Governments, stated in popular language, are these :—

1. The United States claim dominion, and the right to legislate

against foreigners, in two-thirds of that part of the waters of the Pacific Ocean called Behring Sea.

2. They claim a right of property in wild animals which resort for a certain season of the year only to their territory, derive no sustenance therefrom, and, during the greater part of the year, live many hundreds of miles away from that territory in the ocean.

3. They claim the right to protect that alleged right of property by search, seizure, and condemnation of the ships of other nations.

4. Failing the establishment of the right of property, they claim a right to protect the fur-seals in the ocean, and to apply, in assertion of that right, the like sanctions of search, seizure, and condemnation.

5. And lastly, failing these assertions of right, they claim that Rules shall be framed in the interests of the United States alone which shall exclude other nations from the pursuit of fur-seals.

On the other hand, Her Majesty's Government claim—

1. Freedom of the seas for the benefit of all the world.

2. That rights of property, and rights in relation to property, be confined within the limits consecrated by practice, and founded on general expediency in the interests of mankind.

3. That, apart from agreement, no nation has the right to seize the vessels of another nation on the high seas in time of peace for offences against property excepting piracy.

4. That any Regulations to be established should have just and equitable regard to all interests affected.

(*Extract from the Preface to the Printed Argument of Her Majesty's Government.*)

I.—The Preliminary Motions.

As the telegraphic reports of the proceedings in the Behring Sea Arbitration which have hitherto reached the British public have been necessarily brief and wholly out of proportion to the great importance of the subject, I propose to lay before your readers a connected account of the material facts and arguments as they are adduced before this august international Tribunal. I shall endeavour to follow the established usage in regard to judicial proceedings, and to treat the whole question, as far as possible, as a matter *sub judice.*

The preliminary motions on both sides occupied the first four days of the Arbitration. It is matter for congratulation that, in the first decisions which were given—in a case involving issues not less important than those which were decided in the Alabama Arbitration, and covering, indeed, an almost greater range of principles—England has not come out second best. For the United States, indeed, it was, perhaps, somewhat unfortunate that the position which she had maintained, and which her Counsel had to contend for in these motions, was directed towards the exclusion of evidence or information which Great Britain considered ought to be, or ought to have been, before the Tribunal. But, in justice to the United States, it must be said that, although the Arbitration Tribunal cannot, from its nature, be bound by too strict rules of procedure, there must be some limit to steps which savour of departure from formal rules. And, therefore, if the United States could have made good her attitude by argument, that attitude would have been amply justified.

On Tuesday, April 4, after an adjournment of ten days, during which all parties were busily perusing the voluminous printed arguments which had been presented on March 23 by the two Governments, the business sittings of the Tribunal commenced. The Attorney-General immediately rose to present a motion on behalf of Great Britain calling on the United States to furnish either the original or an authentic copy of an important report bearing upon seal life, which had been prepared by Mr. H. W. Elliott, an American expert on the subject. Mr. Elliott is, indeed, something more than an expert; he is one of the few standing authorities on the habits of the fur-seal, and, as Sir Charles Russell justly said, had, in the diplomatic correspondence leading up to the Treaty of Arbitration, been vouched by successive Ministers of the United States as an authority without equal. The

history of the report in question is interesting. A special Act of Congress was passed in April, 1890, authorising the Secretary of the Treasury to appoint some person, well qualified by experience and education, as a special agent for the purpose of visiting the various trading stations and native settlements on the seal islands, and for the purpose of collecting and reporting to him all possible authentic information upon the present condition of the seal fisheries of Alaska. Mr. H. W. Elliott was the gentleman chosen, for the obvious reason that he was one of the most competent persons, if not the most competent, to whom the task could be intrusted. It was no straining of language, therefore, to call the document a "statutory report." But it did not form part of the United States Case, and, strangely enough, was not referred to in it. But the British Commissioners had early got wind of it. It had appeared in the columns of an American paper, the *Cleveland Leader and Morning Herald* of May 4, 1891. A document of such interest, signed "H. W. Elliott," naturally excited considerable interest in the Commissioners' minds; the perusal of the newspaper version of it seemed to have invested the document with even greater interest, and the strange omission of any reference to it in the American Case raised the interest in it to the highest point. An application was thereupon made to the Agent of the United States for its production. The answer was a refusal, the Agent declining to produce the report, on the ground that the Treaty did not warrant the application for its production. The right to its production seemed too clear for argument; and it excited no little surprise when it was understood that the matter was to be argued, and the position assumed by the United States was to be defended.

The ground taken was a purely technical one. Article IV. of the Treaty provides as follows:—

"If in the Case submitted to the Arbitrators either party shall have specified or alluded to any report or document in its own exclusive possession, without annexing a copy, such party shall be bound, if the other party thinks proper to apply for it, to furnish that party with a copy thereof; and either party may call upon the other, through the Arbitrators, to produce the originals or certified copies of any papers adduced as evidence, giving in each instance notice thereof within thirty days after delivery of the case."

To put the matter concisely, the American argument resolved itself into this. The first part of the above article did not apply to the report in question. The case mentioned there was that where one party had specified or alluded to a report "in its own exclusive possession" the other party might then apply for a copy. Obviously these words had nothing to do with the case. The document in question had, indeed, been very distinctly specified and alluded to by Great Britain, but it was not in Great Britain's "exclusive possession." *Quod est demonstrandum.* So far as the report was concerned, so far as the newspaper extract was concerned, Great Britain could

produce that as much and as often as she pleased. And if the first part of the article of the Treaty did not apply, no more did the second. What document was it that had been "adduced as evidence"? No other than the *Cleveland Leader and Morning Herald;* certainly not Mr. Elliott's report; and therefore it was still further proved to demonstration that the position taken up by the Agent of the United States was perfectly sound, and that the Tribunal could make no order. These points Mr. Phelps set forth in graceful language and with much insistence. More especially did he dwell on the fact that the case was closed and that the application was too late; but the point he wished so specially to bring to the notice of the Tribunal was that, if it were produced from the exclusive keeping of the United States at this time of day, the United States would have no opportunity of answering it!

But it meant nothing after all. So astute a diplomatist as Mr. Phelps could not fail to see that the position was a false one. He spun a web of words and argument, quite skilfully it must be confessed, to cover the "backing down"; but he indicated in his first sentence that the States did not intend to insist any longer. There was just one touch of unconscious humour about the argument. In insisting no longer on their original position, the States would now insist on another; if the report is admitted as evidence, it must be as evidence for both parties. Senator Morgan wanted to know whether it was possible for Counsel to do this sort of thing, and at this sort of time make little arrangements among themselves for the admission of evidence into the cause. The same idea had occurred to Mr. Phelps, but . . . . ; in short the United States would produce the document. Mr. Carter then once more attempted to make it perfectly clear that America was right after all. Surely there was one curious point, he remarked, about this report. Everybody knows what happens to reports when they are made to Governments. They are published; that is what they are written for; yet this one was not published. How was that? There must have been some reason for it. A scientific gentleman selected for his knowledge and attainments, selected under a special Act of the Legislature, selected to ascertain all sorts of truths, makes his report to the Government who selected him, and that Government does not publish it. There must have been something wrong somewhere. Mr. Carter was not going to inform the Tribunal why this thing, this "common practice of nations" (a phrase we shall often hear before the case is over), was not followed in this particular case. He was not at liberty to say; it was doubtful even if he knew. But he might suggest, merely suggest, a possible reason or two. Congress (which is a body conversant with the manners and customs of the seal) may have conceived the report to be wholly erroneous, or unworthy of credit; or it may have been inspired by bad motives; or it may have been inspired by motives hostile to the interests of the United States and to their management of the Pribylof Islands; or . . . Advocates who will drop their guard must expect to suffer the consequences

of bad fencing. The *riposte* came swiftly and with unerring effect. Said the Attorney-General in his reply,—My learned friend suggests hypotheses to account for the non-publication of the report; let me suggest another, and perhaps a more natural reason—that it was not deemed to be favourable to the view for which it was originally designed. Then, after some dispute as to whether the report was produced "by order" or "by consent," the Tribunal "directed" that the document should be regarded as before the Tribunal, to be made such use of as the Tribunal should see fit. And so the first round ended in favour of Great Britain.

The Tribunal next proceeded to the consideration of the motion of the United States to dismiss from the case, and to return to her Majesty's Agent, a certain "Supplementary Report" of the British Commissioners appointed to inquire into seal life in Behring Sea, which had been presented to the Arbitrators on March 25. The ground taken was that it was presented at a time and in a manner not allowed by the Treaty; that it was, in fact, out of time. Much misconception as to the result of the decision of the Tribunal on this motion seems to have prevailed in England, it being interpreted adversely to Great Britain. One of the features of the settlement of the dispute as to the rival claims of the island and of the pelagic sealers, arranged between Sir Julian Pauncefote and Mr. Blaine, was that a joint commission of experts should be appointed, two from each side, to meet and proceed to the Behring Sea, there to gather information from all sources as to the doings of the fur-seal, to make their own observations, and to report. We must now turn to the Treaty of Arbitration to see what use was to be made of the labours of these four experts. The machinery of the Arbitration was determined by Articles III., IV., and V. Then came Article VI., which contains a statement of the questions which the Arbitrators were to decide. "In deciding the matters submitted to the Arbitrators it is agreed that the following five points shall be submitted to them in order that their award shall embrace a distinct decision upon each of the said five points ——." So that from the preamble of this section it was clear that the five points did not cover the whole ground of the Arbitration, but, for an object which is perfectly clear, these five points of dispute were to be distinctly decided before any other matters were taken up. The five points were grouped into two—the first raised the historic question, the second the protection and property question. The due sequence of every stage of the proceedings was, in fact, arranged with logical precision. Nor does it at all appear that this precision had been disturbed by Article VII. It runs thus:—

"If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of regulations for the proper protection of the fur-seal in or habitually resorting to the Behring Sea, the Arbitrators shall then determine what concurrent regulations

outside the jurisdictional limits of the respective Governments are necessary, and over what waters such regulations should extend."

Everything still seems plain. The other matter submitted to the Arbitrators has now been referred to—it is the question of what regulations are to be made. In the preamble to the Treaty jurisdictional rights were mentioned as being to be determined; but the preservation of the fur-seal was also referred to, and is, indeed, the chief object to be attained—only, as to the method of preserving the animal, the United States claimed to undertake it by herself. To this the pelagic sealer raised strong objections, and therefore the right of the States to undertake it had to be put directly in issue; and it was in fact put in issue by the two groups of questions propounded to the Arbitrators in Article V. Had the United States any such right derived from history? Had the United States any such right derived from the law of property?

Still we may pursue the even tenour of our reading:—If the determination of these questions . . . . . leaves the subject in such position that the concurrence of Great Britain is necessary, ... *id est*, If the States have no exclusive right to regulate sealing and sealers when the seals are found outside the ordinary three-mile limit, then the concurrence of Great Britain must be necessary before she can allow her sailors to be interfered with. So it is clear that "if" something is settled the Arbitrators shall "then" determine what regulations are necessary.

But the question of regulations is obviously very different in its nature from the questions of history and of property already alluded to. Documents drawn from the archives of the two nations would determine the one; principles drawn from the law books applying to the right of property in, or of protection of, migratory wild animals when they are on the high seas, would determine the other. No special knowledge or information was necessary. But with the question of regulations, which the Arbitrators were "then to determine," it was far otherwise. They, in common with the rest of the world, know nothing about the habits of the seal—knowledge which is obviously essential to the settlement of regulations for the sealing industry. It is not surprising, therefore, to find that this seventh article continues thus:—"And to aid them in that determination, the report of a joint commission, to be appointed by the respective Governments, shall be laid before them, with such other evidence as either Government may submit." Here, then, as Great Britain contended, was the simple machinery by the aid of which the Arbitrators were to enter upon the second part of their labours. All questions of right, of national history, of the contents of documents written in the early years of the century; all questions of common law, of international law, being put on one side, and the questions depending upon them being answered in a certain way, the Tribunal were to undertake an inquiry of a very different nature; of a nature so different, indeed, that it was not surprising that the formal machinery devised for the first part of the case,

which had indeed been based upon the legal procedure of an action, should be considered inapplicable to it; and that, questions of right being no longer involved, the simplest method for gathering reliable information should be resorted to, and all formalities and technical questions of time and place should be discarded.

The Commissioners were appointed; they met, and explored the utmost recesses of the Aleutian Islands and the Behring Sea. But the joint report was a very short affair. The Commissioners jointly reported that, having utilized all sources of information available, they were "in thorough agreement that, for industrial as well as for other obvious reasons, it is incumbent upon all nations, and particularly upon those having direct commercial interests in fur-seals, to provide for their proper protection and preservation." They further stated that they had found that, since the Alaska purchase, a marked diminution in the number of seals on, and habitually resorting to, the Pribylof Islands had taken place; that it had been cumulative in effect, and that it is the result of excessive killing by man. But, on certain fundamental propositions, a considerable difference of opinion existed, and it was therefore thought necessary to state the conclusions arrived at by the two sets of Commissioners respectively in separate reports.

But quite early in the proceedings a grave difference of opinion arose between the two Governments as to the object of these reports and the purposes to which they could be put. To state the matter very concisely, the views taken by England and the United States were as follows:—England considered that these reports, called into being by the Treaty for a special purpose, were only to be used as evidence when the contingency for their use should arise—that is to say, when the Arbitrators should proceed to consider the subject of regulations: that they were immaterial and irrelevant to the determination of the questions of right, the simple facts necessary to determine the question of property in the seals as animals *feræ naturæ* resorting to the American islands being already known. And, this view being acted upon, the Case for Great Britain was prepared without reference to the report of the British Commissioners, or to any of the interesting facts relating to seal life which it contained. The United States, however, took a diametrically opposite view. The American advisers considered that all the hundred and one details of the habits of the animals had a material bearing on the question of property as well as on the question of regulations, and the report of the United States Commissioners was included in their Case, and was frequently referred to in it. A diplomatic correspondence followed, and, after some consideration, Lord Rosebery consented to forward to the United States the British Commissioners' report, and consented further that it should be treated as part of the British Case. He maintained, however, the position which had been taken up by the British Government as the only possible interpretation of the Treaty of Arbitration. The United States thereupon

accepted the report as part of the British Case; but the Government still insisted on its former position, and reserved the right of taking any further steps by way of objection that it should deem proper. It denied altogether the British position that the two stages of the Arbitration were to be kept quite distinct, and maintained that the machinery for all parts of the case, whether involving questions of right or questions of regulations, was provided by the third, fourth, and fifth Articles of the Treaty, that the two questions could not be separated so clearly as was contended by Great Britain, that there would be otherwise no possibility of replying to a report held back as it had been the intention of Great Britain to hold back this report, and that any other view of the matter would involve two arbitrations, two hearings, two decisions, two awards.

But the British Commissioners had been indefatigable, and were still drawing conclusions from the facts they had obtained, were still trying to fathom the mysteries of the seals' existence. On the 31st of January, 1893, they sent a supplementary report to the Secretary of State for Foreign Affairs. This in due course was printed, and in due course—namely, on the 25th of March—it was sent to the other side, and presented to the Arbitration. And then General Foster, the Agent of the United States, sent it back again "unread," with an intimation that he would move to have all the copies which had been distributed returned to the British Agent. It seemed a pity that so interesting a document, a report which was the result of so much labour and thought, and which, if it had been read, instead of remaining "unread," by the learned Arbitrators and American Counsel might have thrown so much light on many of the dark passages of the life and doings of the pinnepedia, should not be made available "to aid the Arbitrators in determining" what concurrent regulations were necessary for the protection and preservation of the fur-seal. That was all that the British Agent desired: merely to aid the Arbitrators; but the Agent of the United States desired otherwise, and that was how the battle came to be fought.

Underlying the motion there was obviously the question whether or not the questions of right and of regulations were to be kept distinct, as England contended; or to be treated concurrently, as the United States contended. The Attorney-General argued that the questions were so distinct, the machinery for obtaining evidence for determining the questions of right so severed from that of obtaining information in aid of the settlement of regulations, that, if it were thought advisable, any information of sufficient value which came to hand, even at the last moment, might be submitted to, and ought to be received by, the Tribunal. And when we consider what the question of regulations means, that if they are found to be unsatisfactory after the Arbitrators have ceased from troubling about them, any amendment will be found impracticable unless the two parties can agree to it, it is not to be wondered at that the Attorney-General should not shrink from taking up a position which is apparently impregnable.

The United States argument resolved itself into this. The case was closed; the Commissioners were *functi officio;* there would be no means of replying to, or testing the accuracy of, the report; and if the British contention were sound it would involve "two arbitrations, two hearings, two discussions, two awards." The absence of opportunity for reply is a strong point, but the United States argument is vitiated by the fact that their view of the question of regulations is tinctured by their view on the question of right. For Great Britain, when the question of regulations is reached, the conflict of right and wrong is over, and she wishes only for the best and most equitable regulations which can be devised for all parties and all nations concerned. And to that end, whether it be viewed as an official communication from the Commissioners, or as statements and opinions of specially competent men, she presented this supplementary report to aid the Arbitrators in determining the question of regulations, and to be taken by them for what they might think it to be worth.

The question took three days and a half to argue. The Arbitrators held a long secret sitting, and on April 12 the President read the following order:—

"It is ordered that the document entitled a Supplementary Report of the British Behring Sea Commissioners, dated January 31, 1893, and signed by George Baden-Powell and George M. Dawson, and delivered to the individual Arbitrators by the Agent of her Britannic Majesty on the 25th day of March, 1893, and which contains a criticism of, or argument upon, the evidence in the documents and papers previously delivered to the Arbitrators, be not now received, with liberty, however, to Counsel to adopt such document, dated January 31, 1893, as part of their oral argument, if they deem proper. The question as to the admissibility of the documents, or any of them, constituting the appendices attached to said document of January 31, 1893, is reserved for further consideration, without prejudice to the right of Counsel, on either side, to discuss that question, or the contents of the appendices, in the course of the oral arguments."

How such a decision can have been construed in England as a palpable hit for the United States it is difficult to conceive. It was not more, nor any less, than the course which the Attorney-General had intimated in the course of his argument that he would be perfectly willing to adopt.

The United States had yet another motion to make—to strike out certain portions of the British Counter-Case, as not being strictly in reply to the United States Case. On this motion the Tribunal made the following order:—

"It is ordered that the argument and consideration of the motion made by the United States of America on April 4, 1893, to strike out certain parts of the Counter-Case and proofs of Great Britain, be postponed until such time as may be hereafter indicated by the Tribunal."

Thus the ground was cleared for action, and in the clearing Great Britain had the advantage.

II.—The Case for the United States, as presented by Mr. Carter.

It would be manifestly impossible to present your readers with anything like a complete summary of Mr. Carter's long speech; but as it has covered the whole ground, and has presented the case for the United States in its final form, I shall endeavour, with such succinctness as may be possible, to put it in the short compass of a readable article. With its many inevitable omissions this will not, I fear, do full justice to the oration, but it will serve at least to throw some light on a case which has hitherto been presented to the world in a somewhat kaleidoscopic fashion.

The early days of the argument were naturally devoted to an examination of the historical question, and not the least curious point about the conduct of the case has been the gradual minimizing of the importance of the question of derivative descent from Russia. It was perfectly true, Mr. Carter said, that much time and energy had been devoted to the unravelling of this question. Mr. Blaine had written two, if not more, lengthy despatches on the point, in which an accurate position had undoubtedly been taken up. But it was quite an unnecessary labour, and was only undertaken by Mr. Blaine because Lord Salisbury had raised the question so emphatically, and Mr. Blaine was thereupon constrained to answer and demonstrate the inaccuracy of his Lordship's position.

But it was quite unnecessary and, strictly speaking, irrelevant. Mr. Carter contended that the United States had from the first asserted the claim of property which she asserted now, and Mr. Blaine himself—even in the distraction of the historical argument which Lord Salisbury had forced upon him —never lost sight of the property claim, and continually reverted to it and asserted it. "The disposition of Lord Salisbury seemed to be to draw away the discussion from the substantial ground taken by Mr. Blaine, that of inherent essential right, and to engage him in a discussion in reference to the validity of Russian pretensions in Behring Sea."

It was an unwise step of Mr. Blaine, Mr. Carter thought, to allow himself to to be drawn away from the impregnable attitude upon which he stood, "impregnable, as it seems to me, and which Lord Salisbury had undertaken, as I think, to avoid; and to pass over to that region of controversy to which Lord

Salisbury had invited him." "That was an imprudent step. The wiser course would have been to say to Lord Salisbury, 'I do not think you have answered the positions which I took, and the positions which I have taken are the main grounds upon which the United States bases its contention, and I shall expect a further and more satisfactory answer to them, if it can be made. But he did accept the invitation of Lord Salisbury, and he took up this question of Russian exercise of authority in Behring Sea, and he wrote a long letter in relation to it." Thus Mr. Carter explained Mr. Blaine's attitude; but it need not longer detain us, for we have now a full exposition of the American position as it relates to the Russian position.

The contention of the United States, as far as it depends on the condition of affairs during the time when the Russian Tsar was Consul of Behring Sea, is, we are told, to be interpreted thus. It does not "rest upon any assertion that Russia had an original right to an exclusive enjoyment of the fur-seal fishery in Behring Sea. It was not an assertion of that kind—it was an assertion that, in point of fact, she had enjoyed that right without interruption and without interference by other Governments during the whole period of her occupation, and that the United States, since they had acquired the territory of Alaska from Russia, had enjoyed, as a matter of fact, without interruption from other nations, the exclusive right of seal fishery in Behring Sea." The two questions were therefore put forward as matters of fact—the fact that Russia had the exclusive possession of these fisheries, and the fact that the United States had the exclusive possession of these fisheries; "and it was no answer to the argument to say that the Governments of several countries, while acquiescing in this exclusive possession in fact, had in language denied the validity of pretensions which had been made."

But the interest in the question—so far, indeed, we may agree with Mr. Carter—centres not in the historical question, involving as it does an examination of antiquated Russian Ukases, difficult to translate, and a critical study of the French originals of Treaties signed in 1824 and 1825, but in the claim of property and protection in the seals, which heretofore, in common with the rest of mankind outside the United States, we had been prone to consider wild animals roaming at large in the high sea.

And this question is very properly introduced by a paragraph of Mr. Phelps's, which has indeed become memorable in the annals of this remarkable controversy. It is not too much to say that it is the keynote of the American argument. He brushes aside all the superfluous questions which Lord Salisbury, as Mr. Carter says so positively, had introduced into the discussion, and lays the foundation for the argument on property and protection, to which Mr. Carter has devoted himself for so long a space.

"Much learning has been expended upon the discussion of the abstract question of the right of *mare clausum*. I do not conceive it to be applicable to the present case. Here is a valuable fishery, and a large and, if properly

managed, permanent industry, the property of the nations on whose shores it is carried on. It is proposed by the colony of a foreign nation, in defiance of the joint remonstrance of all the countries interested, to destroy this business by the indiscriminate slaughter and extermination of the animals in question, in the open neighbouring sea, during the period of gestation, when the common dictates of humanity ought to protect them, were there no interest at all involved. And it is suggested that we are prevented from defending ourselves against such depredations because the sea at a certain distance from the coast is free. The same line of argument would take under its protection piracy and the slave trade when prosecuted in the open sea, or would justify one nation in destroying the commerce of another by placing dangerous obstructions and derelicts in the open sea near its coasts. There are many things that cannot be allowed to be done on the open sea with impunity, and against which every sea is *mare clausum;* and the right of self-defence as to person and property prevails there as fully as elsewhere. If the fish upon Canadian coasts could be destroyed by scattering poison in the open sea adjacent, with some small profit to those engaged in it, would Canada, upon the just principles of international law, be held defenceless in such a case? Yet that process would be no more destructive, inhuman, and wanton than this. If precedents are wanting for a defence so necessary and so proper, it is because precedents for such a course of conduct are likewise unknown. The best international law has arisen from precedents that have been established when the just occasion for them arose, undeterred by the discussion of abstract and inadequate rules."

Herein lies the germ of the whole American argument. It sometimes happens that a long, complicated, and elaborate argument can be shorn of its superfluities and redundancies, and reduced to a comprehensible compass. Seldom, however, has a text been laid down so concisely before, and the superfluities and redundancies added, superimposed, afterwards. This statement of Mr. Phelps's is the irreducible *minimum* of the United States argument, but the elaboration has come afterwards; the natural order of arguing has been inverted.

And now it is time to trace in outline the superimposed mass of argument of which Mr. Carter has unburdened himself.

The first question to which the argument was naturally addressed was, "What law is to govern the decision?"—a simple question enough; and the outline of the answer was as follows. The determination must be grounded on principles of right, for the arbitrament of force can only be replaced by the arbitrament of right. The decision of the Tribunal must be a just conclusion of law. This is a juridical proceeding; the parties have chosen jurists learned in the law as their judges; they intended that the law should determine their rival claims. So far, all goes well. The Government of the Queen had, in written argument, itself submitted the same answer to this question—the law. But from this point the American argument digresses into lines which were familiar once, but which (though we refrain from criticism at present, in accordance with the tradition of dealing with

matters *sub judice*) we thought had passed into the limbo round the moon. The law governing the decision must be a moral rule—a rule dictated by the moral sense. It must be adjudged on principles which both nations and all the Arbitrators alike acknowledge; in other words, those dictated by a general standard of justice upon which civilized nations are agreed. For law to which there is such an agreement is international law.

But there is another law involved in international law; it is for the most part derived from the law of nature, "a term very common with writers on international law." "This law of nature is sometimes designated by different terms, sometimes as a natural law, sometimes as natural justice, sometimes as the dictates of right reason; but by whatever name it is described, the same thing is always intended. It means, in short, those rules and principles of right and wrong which are implanted in every human breast, and which men recognize in their intercourse with each other, because they are men having a moral nature, and brought into conditions with each other which compel the application of moral rules." And then followed quotations from Sir James Mackintosh, Mr. Justice Blackstone, and Sir Robert Phillimore, and many others who have in times past and present discoursed on Lord Bacon's text, that "there are in nature certain fountains of justice whence all civil laws are derived, but as streams and like as waters do take their tinctures and tastes from the soil through which they run, so do civil laws vary according to the regions and Governments where they are planted, though they proceed from the same fountain."

In this fashion Mr. Carter proceeded to lay the foundations of his argument and it was, perhaps, not surprising that he should cap this branch of it by a reference to Justice Story's vague *dictum* in the case of "La Jeune Eugénie":

"But I think it may be unequivocally affirmed that every doctrine that may be fairly deduced by correct reasoning from the rights and duties of nations and the nature of moral obligations may theoretically be said to exist in the law of nations, and, unless it be relaxed or waived by the consent of nations, which may be evidenced by their general practice and custom, it may be enforced by a Court of Justice, wherever it arises in judgment."

Passing to the subject of property, Mr. Carter propounded two questions. First, whether the United States have a property interest in the seals themselves, not only while they are upon the breeding islands, but also while they are on the high seas. Secondly, whether, if they have not a clear property in the seals themselves, they have such a property interest in the industry long established and prosecuted on the Pribylof Islands of maintaining and propagating the herd, and appropriating the increase to themselves for the purposes of commerce and profit, as entitles them to extend their protection to such herd against capture while it is on the high seas, and to require and receive from other nations an acquiescence in reasonable regulations designed to afford such protection.

In finding the answers to these questions the threads of moral, natural, and international law were taken up and ravelled in dexterous fashion.

"It is to be observed that, although the established doctrine of municipal law may be properly invoked as affording light and information upon the subject, the question is not to be determined by those doctrines. Questions respecting property in lands, or movable things which have a fixed *situs* within the territorial limits of a nation, are, indeed, to be determined exclusively by the municipal law of that nation; but the municipal law cannot determine whether movable things like animals are, while they are on the high seas, the property of one nation against all others. If, indeed, it is determined that such animals have a *situs* upon the land, notwithstanding their visits to and migration in the sea, it may then be left to the Power which has dominion over such land to determine whether such animals are property; but the question whether they have this *situs* must be resolved by international law."

Blackstone and Kent were next cited as authorities for the following proposition:—

"That the essential facts which render animals commonly designated as wild the subjects of property not only while in the actual custody of their masters, but also when temporarily absent therefrom, are that the care and industry of man, acting upon a natural disposition of the animals to return to a place of wonted resort, secure their voluntary and habitual return to his custody and power, so as to enable him to deal with them in a similar manner, and to obtain from them similar benefits, as in the case of domestic animals. They are thus for all the purposes of property assimilated to domestic animals."

And the Alaskan fur-seals are typical examples of the application of this doctrine; for by the imperious and unchangeable instincts of their nature they are impelled to return from their wanderings to the same place; they are defenceless against man, and in returning to the same place voluntarily subject themselves to his power, and enable him to treat them in the same way and to obtain from them the same benefits as may be had in the case of domestic animals. And therefore the proposition independently laid down above must apply. Therefore these fur-seals thus become the subjects of ordinary husbandry as much as sheep or any other cattle. All that is needed to secure this return is the exercise of care and industry on the part of the human owner of the place of resort. He must abstain from killing or repelling them when they seek to return to it, and must invite and cherish such return. He must defend them against all enemies by land or sea. And in making his selections for slaughter he must disturb them as little as possible and take males only. All these conditions are perfectly supplied by the United States, and their title is thus fully substantiated. It is indeed altogether an idyllic picture, both in fact and in law; and, if it were not for an undue disregard of the laws of *propter* and *post*, it might be quite sufficient

to establish the case of the United States. But those laws are inexorable, and will not be tampered with.

But there was another string to the American bow. If authority and principle thus clearly defined their rights and made their case so strong, how much stronger would it be if the grounds and reasons on which the institution of property stands also pointed clearly in the same direction! "If we knew what these reasons were, we might no longer entertain even a doubt upon the question whether the Alaskan seals are the subjects of property." The attention of the Tribunal was therefore invited to a somewhat careful inquiry into the original causes of the institution of property and the principles upon which it stands; "and the Counsel for the United States will be greatly disappointed if the result of the investigation should fail to satisfy the Tribunal that there is a fundamental principle underlying that institution which is decisive of the main question now under discussion. That principle they conceive to be this—that, whenever any useful wild animals so far submit themselves to the control of particular men as to enable them exclusively to cultivate such animals and obtain the annual increase for the supply of human wants, and at the same time to preserve the stock, they have a property in them; or, in other words, whatever may be justly regarded as the product of human art, industry, and self-denial must be assigned to those who make these exertions as their merited reward." Space is not available to follow Mr. Carter's excursions into the realms of social economics. Suffice it to say that the conclusion of the whole matter was this—that it was a fundamental law that everything—that is, everything susceptible of ownership—must have an owner, and that the institution of property embraces all tangible things, subject only to these three excepting conditions. First, they must have that utility which makes them objects of human desire; secondly, the supply must be limited; thirdly, they must be susceptible of exclusive appropriation. "This conclusion is a deduction of moral right drawn from the facts of man's nature and the environment in which he is placed; in other words, it is a conclusion of the law of nature; but this, as has been heretofore shown, is international law, except as far as the latter may appear, from the actual practice and usage of nations, to have departed from it, or to speak more properly, not to have risen to it."

Need it be said that these conditions are found to fit the case of the seals; and that the case of the seals is found exactly to fit into the prescribed conditions?

Mr. Carter then dealt with certain other propositions, the correct epithet for which—whether "new" or "old"—it is somewhat difficult to determine. Property is not absolute; it is given to men by the benign Giver of all good, coupled with a trust; man the owner has but the usufruct; but, whether this usufruct alone, or the *corpus* of the property, is included in the trust, a beneficial interest in which may be claimed by man the non-owner, is not

exactly clear. But trust there is, and use alone is granted; abuse, waste, and, above all, non-use are strictly prohibited; nay, more, may be punished. Nay, more, if such things happen, man the non-owner, the *cestui que trust*, may enter [*sed quære* by force of arms] upon his own again. And as it is with men so it is with the nations. If it were not so, how could we say that, if one nation in all the earth held all nature's supplies of, say, that gift of Divine Providence—india-rubber—and refused to cultivate it, and let its plantations go to rack and ruin, the other nations could come in and possess the land, and make it flow again with the dew of the india-rubber plant, and compel the refractory nation to do its cultivation quickly and while there is yet time, lest, if the markets of the world were deprived of their commodity and necessity, worse things happen to her—such things as war, the condign chastisement, or complete absorption or annihilation, or the establishment of a protectorate, or of consular jurisdiction, that blessing in disguise, or any of the many forms of civilization's benefits? How, indeed? Look at history—and geography. See the wild Indian on the plains, the white man's "ward"; see the poor African, and the Chinaman—and the Egyptian *; see the hand of England everywhere executing her Divine duty, but in a new character—that of the *cestui que trust*, claiming with much insistence to enjoy the blessings of nature which those negligent trustees are withholding from her.

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Once more within the domain of law, one feels more at home in following Mr. Carter's argument, although criticism of it is necessarily withheld for the present. The subject of his final appeal to law proper as distinguished from sources of law was the right of protection and self-defence. Legally the question is somewhat inchoate, and, by reason of the few actual precedents, allows some latitude, not merely for theoretical speculation, but for more solid analogical argument. Of this latitude Mr. Carter has, properly I venture to think, availed himself to the utmost. When the Attorney-General has completed his reply to this branch of the case it will be possible to discuss the

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* Mr. CARTER: . . . Why is Great Britain in Egypt maintaining a control over the destinies of that region? What ground has she for asserting a dominion over these poor Egyptians? Weak and feeble they are indeed, and incapable of resistance. Is that the only defence? No. I fancy those who are in charge of the defence of the interests of Great Britain can make out a better case for her than that. It is because Egypt is the pathway of a mighty commerce; it is because it is necessary that that commerce should be free and unrestrained. That great avenue of the world's traffic must be made to yield its benefit to mankind; and if the Government of Egypt is not capable of making it thus yield its utmost benefit, if she is incapable, in other words, of performing her trust, other nations have a right to interfere and see that the trust is performed.

THE PRESIDENT: Mr. Carter, you are taking a very high point of view, because you seem to me to anticipate, in some measure, the judgment of history. I will not say more to-day.

difficult problems involved in the question of jurisdiction on the high seas, outside the territorial waters ; such jurisdiction as is involved in the Hovering Laws and the Quarantine Act. For the present, however, I must content myself with giving briefly the propositions which, on behalf of the United States, Mr. Carter advanced.

In the just defence of its existence, or its rights, a nation may employ, anywhere upon the high seas, such force as may be necessary and reasonable.

The action of the officers and agents of a nation, in exercising this right of necessary self-defence, may, and should, be governed by rules in the form of executive instructions or municipal laws. But neither are necessary to the existence of the power, though they serve to govern the exercise of it. In Constitutional Governments, where the Sovereign power is distributed among different departments, such rules may be necessary; other Governments cannot insist on them.

In the exercise of this power of self-defence the nation is responsible to other nations whose citizens may have suffered from its exercise. If a necessity is shown for its exercise, and the limitations of such necessity have been observed, the act is justified. If otherwise, a wrong has been committed and reparation must be made.

Capture of vessels for carrying contraband of war, or for running a blockade, are familiar instances of the exercise of this right of self-defence.

The notion that this right of self-defence is a purely belligerent right not to be exercised in time of peace is unfounded. It proceeds upon the manifestly erroneous assumption that the rights of a nation upon the seas cannot be attacked or endangered except in time of war. That the instances calling for the exercise of the right in time of war are more frequent, and that they are comparatively rare in time of peace, is true; but that they may, and do, arise in time of peace is equally true.

If it were true that a nation could not exercise in time of peace any act of force to protect its rights, it would follow that a nation could not interfere with a vessel under a different flag which was hovering on her coast, outside the three-mile limit, with an openly avowed intention of evading the revenue laws of the nation, or of engaging in illicit trade with a colony, or of running in at a favourable moment and rescuing convicts; nor could a nation prevent a foreign ship with an infectious disease on board from coming within a distance of four miles from a port. Such a conclusion would be repugnant to reason as well as to the actual practice of nations.

The municipal rules adopted by nations to govern the exercise of the right of self-defence are not always rigidly limited to a regulation of that right; but they sometimes seek to exercise a limited legislative power beyond the territorial limits of the nation. As far as they have the latter purpose in view they are exceptional, and can be defended only upon grounds of special necessity.

It is not necessary for the United States to insist, nor do they insist, upon a right to punish individual citizens of other nations who have been engaged in pelagic sealing, nor upon a right to seize and condemn vessels for having in the past been guilty of pelagic sealing, nor upon a right to establish any area of exclusion around any part of its territory. It insists only that, if it be determined that it has a property in the Alaskan seal herd, or a property interest in the industry which it maintains upon the Pribyloff Islands, it follows, as a necessary consequence, that it has the right to prevent the invasion and destruction of those property interests, or either of them, by pelagic sealing, by the employment of such force as is reasonably necessary to that end.

The United States insist that, if their contention on the subject of property be well founded, they have the right to prevent the taking of seals in the neighbourhood of the Pribylof Islands in the only manner in which it would be possible to prevent it—namely, by the capture of the vessel: and that it can make no difference whether such vessel be three or four or more miles from the islands; and that, if such capture may be made anywhere within four miles of the islands, it may lawfully be made at any distance from the islands, where such right may be invaded in the same manner. And that to this end the right exists without the necessity for any municipal law to secure it or govern it. But that the passage of a law regulating the exercise of such right, and providing for a mode of condemnation of vessels seized, would be entirely proper, and one of the reasonable duties of the Government.

As to the seizures themselves, and the decrees of condemnation thereon, the United States perceive no particular in which they are irregular, unjust, or not defensible as an exercise of the right of necessary self-defence. They do not defend any sentence of fine and imprisonment imposed upon any citizens of other nations for engaging in pelagic sealing, but insist that any invalidity with which such sentences may be affected has no tendency to impair the validity of a sentence of condemnation otherwise valid.

Finally, the Government of the United States bases its claim to defend its property interest in the seal herd and in its industry maintained upon the Pribylof Islands by such force exerted upon the high seas as may be reasonably necessary to that end upon the following grounds:—

1. The reason and necessity of the thing, there being no other means adequate to the defence of such rights.

2. The practice and usage of nations, which always employ this means of defence.

III.—A Chapter in Natural History.

"I AM sure you would all like to know at the start what a seal is!" Thus Mr. Coudert, following Mr. Carter, on behalf of the United States. Yes, it would be most interesting to know what a seal is, for, truth to tell, we have but a feeble notion. We are little disposed even to keep the distinction between seals and sea-lions clearly in our minds; and when that distinction has at last been fully realised, we raise the anger of the naturalist hotly against us, refusing to see clearly the manifest differences between the hair-seal and the fur-seal. For us they are seals generically, which is not as it ought to be. But we are wiser now after these many days of argument: we fully realise that the hair-seal is quite an ordinary beast, in not much danger of extinction, whose coarse-haired skin is made into husbies and other such inelegant articles of wear; whereas the fur-seal (since, at least, Frank Buckland discovered the method of removing the long hairs and leaving the fur intact, and since the estimable Mons. Worth has compelled Fashion in its favour) is, save only the too-scarce true *peau de l'outre*, the softest and most valuable fur known for those purposes of grace and beauty to which it is put. To know, therefore, what a fur-seal is, to know how at a glance to distinguish it from its brother the hair-seal, would be, therefore, to be well versed in a very interesting branch of natural history. But, before we submit ourselves to Mr. Coudert's guidance in this matter, we must be quite clear as to what he is driving at. He is about to "lay the foundation upon which the superstructure" of his brother Carter's argument rests. "My brother Carter has gone so elaborately over the whole case, with the exception of the facts, and he has visited and taken possession of, occupied, adorned, and fortified [as in my last letter I showed you] all the lofty grounds in such a way, that there is very little left of that part of the case for those who follow him in the argument. But," continued Mr. Coudert, "it is a comfort to me that he cannot stand unless I now come and give him some help. He has assumed, and most properly, certain facts to exist in the case. If those facts exist, his argument is perfect": it was for him to show that they do exist. So to support Mr. Carter's argument on the law of wild animals, this chapter of natural history was unrolled, the drift of it being to show that the fur-seal is not a wild animal at all, but that it is a "tame animal"! Yet stay, is not this going too far? Is it necessary to Mr. Carter's argument, with its divisions of animals into tame and wild, with an intermediate class which so approaches to domestic that it is in fact and in law domestic—is it necessary to this argu-

ment to show that the seal is "not only a domestic animal, but one of the most profitable of domestic animals"? Does it not go just a little too far? Let that pass; we seek at Mr. Coudert's feet knowledge only of what a fur-seal is. As for the consequences of that knowledge, and the legal effect of it, those are matters for the Tribunal to deal with: they are not for me.

Here, then, is the key-note of Mr. Coudert's teaching: "It is a tame animal: it is easily taken: it is handled as readily as a lamb." "The process of selection for slaughter on the islands is a simple one. The animals are driven precisely as sheep, but apparently with more ease. They are so tame, so gentle, so easily killed, that they can be driven into a pen by the hundred—those that ought to be killed may be selected, and the rest may be dismissed."

"Dismissed!" What a pretty word.* It is the correlative to that other pretty word the Counsel for the United States were so fond of using—"invited." The seals are "invited" to the islands (as Mrs. Bond invited her ducks, and as her prototype the Spider invited the Fly into that prettiest of parlours), and when the superfluous males have been selected they are "dismissed" from further attendance. But the language throughout was beautifully and systematically chosen. The seals were "invited" to the islands; when they accepted the invitation they "voluntarily submitted to the control" of the United States; of a "gentle and confiding disposition," they "committed themselves to"—nay, "implored the protection of"—the Great Republic; and when they come to the islands they were "cherished"—excepting of course the superfluous males who submitted to the indignity of being knocked on the head.

And the climax, what a touching picture it is of the relations which ought to exist between man and the lower animals. The seals—presumably the wily "see-catchies," fathers of the so-called "herd," whose skins were old and valueless—so semi-human are they, have made a "pact" to render a sort of tribute (by way of rent for the Pribylof Islands) to the United States of a certain number of skins annually, on condition that they are taken from the bodies of the superfluous males alone.†

The seal indeed is an intelligent animal. It recognises the beneficence of the methods of killing adopted on the islands, and woe betide those hunters who adopt other methods. The spear, too, of the Indian the seal admits as a necessary evil of its civilization; even the musket it tolerates, for "you must bear in mind that these seas are agitated; that the seal, the sleeping mother, even when she sleeps confiding in the humanity of man, because the instinct of the mother tells her to confide, may escape a musket because of this

* As to the true meaning of the word, see note on p. 36.

† "Polygamous in its nature, compelled to breed upon the land, and confined to that element for half the year, gentle and confiding in disposition, nearly defenceless against attack, it seems almost to implore the protection of man, and to offer him as a reward that superfluity of increase which is not needed for the continuance of the race."—*U. S. Printed Argument*, p. 92.

motion; and when the pelagic sealer has missed, he has to go through the old-fashioned process, which the older members of the Court are familiar with, of loading through the muzzle and missing fire half the time." The seal, you see, put up with the musket; but now the shot gun has replaced it, its anger has been kindled against the hunter, it will tolerate him and his ways no longer, and "when the poor animal is shot dead he revenges himself by dropping like a shot. That is the only revenge that he has." Could intelligence go farther?

We gather—or perhaps we have misunderstood the drift of the evidence—that this intelligence is implanted in the animals by the "cherishing" care of the United States, that it is part of the scheme of "domestication," or that it is the result of it: but on this point we confess to having some doubt. We cannot indeed venture to say how far the "tame" and the "tamed," the "domestic" and the "domesticated," evidence is intended to be seriously advanced: whether "the seal is born tame" is not a flight of exuberant rhetoric representing the phocal "I was born free."

One example of attempted domestication however the archives of the Arbitration afford us, in the melancholy history of little "Jimmy." He—a seal pup—was the child of adverse circumstances, as his mother happened accidentally (*id est:* contrary to the rules of "driving," which decree that "superfluous males" alone shall be selected—a thing easy to be done) to be caught in a large drive, and could not be separated from the herd until the killing-ground was reached. After she was allowed to go free, on her way to the water she hurriedly gave birth to this pup and continued on her journey. When it was found to have been deserted, it was brought to the village. For the first few days nobody could make him eat, and as he would generally get the best of the friendly fingers which attempted the feeding, he was left severely alone. Spoons and bottles were tried in vain: till at last the operation of injecting cow's milk down its throat was successfully performed by means of a syringe and a long tube. "Jimmy" was then left to his own devices. He immediately showed unmistakable signs of the greatest of seal-delight—lying down in the various positions of seal-comfort, on his back and side, waving and fanning himself with his flippers, scratching himself, bleating, *et cetera*. The operation appeared to be successful, and he seemed to be doing finely. But the next morning he was found dead. So much for "domestication" and "rearing."

The case was, however, put on a lower plane, which did not need flights of fancy. "We are raising seals on the Pribylof Islands as sheep are raised in Australia, as cattle are raised in the far West." Yet even here on this plane—that they are domestic animals only "in the broad sense of the term"—which needs, if it were true, no hyperbole to convey it to our intelligence, the words used bear no relation to the fact described. The assertion that they may be tended like sheep was shown by the fact that a drove of three thousand seals

have been left under the control of one small boy: * the evidence of the fact was equally consistent—perhaps more consistent—with the suggestion that the three thousand seals were asleep upon a hauling-ground, and the small boy was looking on. Then they "soon grow accustomed to the sight of man (and boy), and in the absence of offensive demonstration on his part quickly learn to regard his proximity with indifference." But then, *mirabile dictu*, owing to the small boy's negligence, these three thousand seals *escaped from his control*, and they all plunged over a cliff, falling sixty feet upon broken stones and rocks along the shore. The fact that only seven were killed may show the wonderful vitality of the seal: but it seems ("seems, madam") to make against that other contention with which we set out. And then the word "raising": it has in the case of cattle some definite meaning. But here it means absolutely nothing more than getting out of the way. If the seals return to the Pribylof Islands by the "imperious and unchangeable instincts of their nature," it is obvious that man has done nothing in the past, and does nothing in the present, towards securing their return. What goes on now has gone on since seals were, and would go on still if the islands were abandoned. They simply come back as the sea-gull comes back to the guano islands, as the salmon to the river, and as the turtle comes back to the sands where it lays its eggs; and that is an end of the whole matter.

There is something humorous about "raising" a fish which has its home in deep waters; but the ingenuity of Counsel had already provided against this criticism. The fur-seal, in spite of the frequent use of the word "fisheries" in official documents, is not a fish: it is essentially a "land animal," although all its food is derived from the sea, and on an average it spends at least eight months of the year without setting a flipper upon the land. The pups become amphibious only as a result of education and necessity. The mother seal—the "cow"—is indeed the sternest of parents; she takes the pup to the sea with her teeth or her flippers, "compels it to swim, and chastises it if it does not." The chastisement is evidently part of the "raising," which, indeed, is so complete that it is necessary to use the terms of the art of the cattle-raiser. The seals are, or could be, "rounded up": they could be, but are not, "branded"; and to make the picture of the Pribylof farm-yard quite complete, a half-humorous enquiry from the

* The Hon. B. F. Tracy has an article in the "North American Review" which adds considerably to the comic side of the subject. On this question of control, he says, "But it is not alone by the act of nature that the seals have been reduced into possession. While here they are in the direct charge and under the certain control of the keepers on the islands. The control of these keepers, and, through them, of the proprietor of the soil, is complete. No one would deny that if the herd were walled up in an enclosure, or if the animals were tied individually with rope, they would be reduced to possession. But so restricted are their powers of locomotion, that, if these measures were adopted, control would not thereby be rendered more perfect." Comment is needless: sarcasm superfluous.

President as to whether seal milk had ever been collected by man was treated as quite a serious possibility: "There is no evidence," said Mr. Coudert, "that I have seen that it ever has been. Probably for some reason or other it is not palatable." And these are gravely stated to be the actual facts in the life of the fur-seal.

It seems extraordinary that it should have been possible so to over-draw the picture of an animal's habits. Some points, indeed, are in legitimate dispute: how far, for example, the American suggestion is true that the cows go two hundred miles to sea to feed while they are nursing; that the cow will only suckle her own pup, and that therefore if a cow is killed at sea the pup on shore perishes inevitably. There is not a little evidence indeed to show that the cows killed in Behring Sea in milk at so great a distance from the islands are taken after the nursing is over, and while the milk is in process of drying up. Then on another all-important point—the migration—there is a considerable body of testimony to show that after they are born many of the seals do not return to the islands—though they return to the Behring Sea—till the third year, when the sexual instinct compels them thither; so that the necessity of land, during its early years at least, is mythical.

These points, and many others, are, as I say, in legitimate dispute; but it goes no distance at all towards their elucidation to present a picture in which fancy so largely takes the place of fact. And all to prove what? That the seal is an animal *sui generis*. Well, so are they all; each animal under the sun is *sui generis:* for were they not all of them created "after their kind"? But for the law a few things only are profitable for enquiry: whether an animal be tame or wild; and whether by art and industry man has confined it so that it cannot escape; or, after he has taken possession of it and reclaimed it from its wild state, has so acted upon its nature that it has become domesticated and subject to his control, and will return to his controlling hand when it has left it for awhile. It is not too broad a generalization to say that no legal conditions, other than those attaching to wild animals, are fulfilled by animals which go down in their migrations to the great deep.

The meaning of the word "dismissed" may be gathered from these few extracts from Mr. Macoun's report:—"A seal, with apparently a broken shoulder, was allowed by the natives to escape [from the killing grounds], though they noticed its condition. . . . 14.1 per cent. of the whole number of seals driven at this time were killed, while among those that escaped I counted seventeen that were badly enough bitten or wounded to bleed considerably. . . . One seal, about six years old, that had been wounded in the belly, was allowed to escape. . . . Another seal had a gash in its back about five inches long. . . . A wounded or bleeding seal was to be seen in nearly every small pod of from thirty-five to fifty that passed through the hands of the clubbers. . . . One young seal escaped with a broken nose, and another with an eye hanging out. Such things attracted no attention from either the natives or the officer of the Government or Company, being apparently considered by them to be quite matters of course."

IV.—A "Twopenny Justice"; and a Villain.

In the Comedy of "The Pelagic Sealer; or, the Crimes of Behring Sea," now being performed in Paris, there are two characters to whose merits justice has not as yet been fully done.

They were men of widely different characters, but both of an ability of a high order; and one was a Twopenny Justice, and the other was a double-dyed villain.

The Justice sat in his District Court at Sitka, in the remote regions of Alaska; and there were haled before him two men, Gutormsen and Norman—men who owed no allegiance to the star-spangled banner. They were the captain and the mate of the Canadian sealing schooner "Thornton," and they, with their catch of seal-skins and their schooner, had been seized by the commander of the United States revenue cutter "Corwin" upon the high seas—*videlicet*, 67 miles from the Pribylof Islands, in Behring Sea, for the offence of killing seals "in the waters of Alaska," contrary to the section 1,956 of the Revised Statutes relating to Alaska therein made and provided.

Then Dawson, Justice, charged the gentlemen of the jury that they were "called upon to determine, or rather to find, the facts in a controversy of unusual importance," and that they might with the greater care and zeal for the truth approach the consideration of the case, he spoke to them in words of solemn warning of their high duties and of his.

And then the skipper and his mate, and the gentlemen of the jury, and, in due course, her Britannic Majesty's representative at Washington, and the gentle Secretary of State for Foreign Affairs, the late Lord Iddesleigh, and, later still, the world at large, all learnt from the mouth of the learned Justice the why and the wherefore of this violation of the freedom of the high seas.

The charge was long, and it was followed in the cases of other captains and mates by considered opinions; and from all of these we learn in brief the following facts:—That the "waters of Alaska" in the statute meant that part of Behring Sea lying to the east of a boundary line which had been drawn in the Treaty of Cession of 1867, when the States bought Alaska territory from Russia; that this line, instead of being used, as the plain man might have thought, to indicate for convenience sake that all the islands in the Behring Sea lying to the east of it had been included in the cession, had

in fact been used to partition off, as between Russia and the United States, that broad expanse of water, some 800,000 square miles in extent, as part of their respective territorial dominions.

In the opinion given as to the grounds on which the condemnation might be supported, the learned Justice dived into the depths of history and roamed through the realms of international law. It was, taking it all round and with attendant circumstances, not so bad for a Judge of an out-of-the-way District Court down away in the Aleutian Islands. The conclusions were indeed unsound, but the worthy Judge knew his history as well as all good Alaskan Judges ought to know it. He betrayed an intimate knowledge of facts which occurred, and of documents which were written, quite in the early part of the century, though a somewhat faulty logic in the arguments led to the sentence of condemnation. The judgment of this learned Justice seems to have met with approval in high quarters. It was cited in despatches as if it were the embodiment of all the learning on the subject. His historical researches in the Sitkan archives became the basis of much diplomatic correspondence. His arguments were reproduced, with some amplification it is true, but still they were the Justice's arguments; for surely no two human beings could independently of each other have arrived by the same erroneous path at the same erroneous conclusion; nay, more, his construction of the statutes was the construction contended for, as it seemed, far down into the pleadings of the two high litigating parties before the Arbitration Tribunal. Judge, then, of the surprise when Mr. Carter said that the worthy Justice and his learned opinions were to be thrown overboard; the Government of the United States was not to be bound by his judgment—opinions, conclusions, all were manifestly wrong, and the United States was going to adopt another line of argument, which was indeed, according to the British argument, still more manifestly wrong. It was not put quite so crudely as this, of course. The new argument was indeed the same as had always been advanced, and it was nobody but Lord Salisbury who had diverted Mr. Blaine into historical disquisitions, and prevented him from stating his propositions with his customary lucidity.

Yet this throwing overboard of Dawson, Justice, was somewhat harshly performed. Ruthless, remorseless, logically legal, and legally logical, Mr. Carter declared that the Judge in stating that Russia by this Ukase had acquired a territorial dominion in Behring Sea, had but stated it as his opinion. But, and this with some emphasis of indignation and some glimpse at a deep constitutional question, has a Judge in the United States District Court of Alaska an authority to speak in an international controversy on behalf of the United States? Certainly none whatever. The position of the United States cannot be gathered from what a Judge of a United States Court happens to say in a charge to the jury. If it can, the United States would be responsible for the utterances of every twopenny Justice of the

Peace throughout the land, which she would be very sorry to do. What! all the pretty chickens gone at one full swoop. Premisses, argument, conclusion, all swept away as the baubles of a Justice's empty brain by this autocratic Counsel for the Government he tried to serve so well. Only a "Twopenny Justice" after all. Yet they got the ships, and got the men, and got the money too. Only a twopenny Justice sitting out yonder in the wilds of Alaska. Yet, nothing that he had said was intended, said Mr. Carter on the following sitting of the Court, to apply to or disparage that very worthy and distinguished Judge. Mr. Carter wished merely to emphasize the irresponsibility of Governments for the utterances of their Judges. Strangely enough, Mr. Carter "did not say that his judgment was incorrect. On the contrary, so far as it related to the condemnation of the vessel it was a sound and correct judgment." The curious part of the story follows.

The lawyer mind in reading thus far may have thought that there was some incident missing. Condemnations do not come about of the mere motion of twopenny Justices. Suits for condemnation, even out there in Alaska, are regularly commenced on behalf of the Government; the case for the prosecution is laid before the Court by Counsel learned in the law. In the United States a "brief" is filed in Court, and in this brief all the facts and arguments on which the prosecutor intends to rely are set out at length. And in the case of the seizure of the "Thornton" sealing schooner, this practice had not been departed from; and—for Great Britain can fight squarely when she pleases—a *verbatim* copy of the brief was read to the Tribunal. It had been published in the *New York Herald*. The preface to the publication of this brief was short and to the point:—

"The Government here are in receipt of advices from Sitka, which contain the brief which is understood to have been prepared at Washington and recently filed in the Court at Sitka by Mr. A. K. Delaney, as Counsel for the United States Government."

And then, with remorseless insistence, the pages and paragraphs of this interesting document were read as published by the *New York Herald*; and there was the old, old story, neatly cut and dried, for the Court to help itself from. All the historical facts, all the jurisdictional arguments, all the old *mare clausum* arguments, all about British acquiescence in the claim (as if Great Britain ever acquiesced in anything in those days, especially with George Canning at one end and Stratford Canning at the other end of the communications). Everything set out under neat sub-heads—"Behring Sea Inland Water," "Russia's Title and Dominion," "Possession and Supremacy," and it wound up with a conclusion of fine language:—

"Enough has been said to disclose the basis of Russia's right to jurisdiction of the Behring Sea under the law of nations, viz., original possession of the Asiatic coast, followed by discovery and possession of the Aleutian chain a-

the shores of Alaska, north, not only to Behring Strait, but to Point Barrow and the Frozen Ocean, thus enclosing within its territory, as within the embrace of a mighty giant, the islands and waters of Behring Sea, and with this the assertion of dominion over land and sea. Such is our understanding of the law; such is the record. Upon them the United States are prepared to abide the judgments of the Courts and the opinions of the civilized world."

And so the great Snark was no Snark after all, but only a twopenny Boojum who had learnt his lesson well.

After the reading, the leading Counsel for the United States rose with some gravity, and said that "it was only fair to my learned friends to state that upon any investigation we have been able to make we have no reason to suppose that that case was prepared by anybody connected with the Government of the United States in Washington or used in that case. It is telegraphed from Ottawa, and that is the first and all that we know about it." Well might the Attorney-General exclaim, "Then it is the most extraordinary case of forgery that the world has ever known."

Afterwards the Attorney-General stated that the gentleman who had procured the copy of the brief for the journal in question had it "in direct descent" from the American Counsel engaged in the case, and, being present in the room at that moment, could testify to the fact in such manner as the Tribunal might think fit.

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The scene changes. No longer are we in the little Court-house at Sitka, presided over by the amiable Judge Dawson. An astute but unscrupulous artist sits in his chamber, gloomy, sombre, fit for the deed he had to do. The man is Ivan Petrof. The deed, forgery.

Events have passed, swiftly as diplomacy will let them. Other skippers and other mates have been condemned to fine and imprisonment. One, they say, on regaining his liberty, but cast helplessly adrift in the inhospitable Alaskan regions, wandered into the woods and died miserably. A quarrel has arisen between two great and friendly nations. Angry correspondence of inordinate length has passed. There seemed, indeed, a time when words might have given way to blows. But all this has changed. The two great and friendly nations, each alleging that the other has committed a great and unfriendly act, have appointed a Tribunal of Arbitration; and the preparation of the pleadings of the nations proceeds apace. The translation of certain Russian documents—Ukases, Charters, correspondence, in fact all the archives of the old Russian Trading Company which opened up under Imperial patronage the resources of the Alaskan territory (resources in which, curiously enough, the fur-seal was hardly counted)—was confided to a Russian scholar, Ivan Petrof. Now, Ivan Petrof was an astute and unscrupulous artist.

The mere fact that he interpolated certain passages into the originals shows

that he was unscrupulous; that he should make these translations so useful that he could palm them off on his unsuspecting employers and get them incorporated into their Case shows him to have been astute. But his title to be called an artist is justified by the fact that when these documents went into his hands in Russian they contained no trace of anything which could support the contention that Russia had claimed and continued to claim dominion over Behring Sea or had persisted in her Ukase, but when they left his hands in English they literally teemed with suggestive sentences, and all running so naturally and flowing so easily that if such documents had been written under the circumstances supposed they would have been couched in no other language than in fact they seemed to be.*

Photographic copies of the original documents had been printed, perhaps triumphantly printed, in the United States Case. But others besides Ivan Petrof, both in the States and in Great Britain, were versed in the Russian tongue; and simultaneously on both sides of the Atlantic the discovery was made of the most extraordinary and impudent forgery of modern times. He had been too zealous for the cause; all his artistically executed interpolations had to go by the board, and all the structure of claim of derivative title from Russia to which they had lent such powerful support crumbled to pieces, and was ruthlessly swept away by the hands of the United States Agent. And then there was nothing left of that interesting claim, based on so much historical research, and founded on so much learning in international law, which had so fascinated the Justice of Sitka.

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Some facts are denied and some are admitted, and the Tribunal will weigh the *pièces justificatives* in the balance and pronounce. With some insistence

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* *e.g.* In a letter of April 9, 1820, from the Russian Minister of Finance to the Minister of Marine, this sentence occurred:—

"Two Russian ships were to be despatched, one to cruise from Sitka, westward and northward, the other ship, however (sailing from Petropaulovsk), having examined the eastern coast of the Kamchatka peninsula up to 62° of northern latitude, and the west coast of America from this latitude to the Island of Unalaska, should proceed to Kadiak, and from there to Sitka for the winter."

Mr. Petrof made the last sentence read thus:—

"From this latitude to the Island of Unalaska and the intervening waters (Behring Sea) should proceed to Kadiak . . . ."

And in another letter, of March 15, 1821, from the Board of Administration of the Russian American Company in St. Petersburg to the Chief Manager of the Colonies at Sitka, this little sentence:

"By a strict observance of such rules, we may hope to make this industry a permanent and reliable source of income to the Company,"

became

"By a strict observance of such rules, and a prohibition of all killing of fur-seals at sea or in the passes of the Aleutian Islands, we may hope to make this industry a permanent and reliable source of income to the Company."

the United States Counsel protest that the case of derivative title was never set up at all as the British lawyers have declared; that the only part which the Russian question plays in the dispute is by way of strengthening the allegation of a property interest made by the United States, by showing that Russia had done at the beginning of the century precisely the same thing that the States were doing at the end of it—namely, asserting a property interest and protecting it, Great Britain meanwhile being acquiescent; and that their true case was "propputty, propputty" only. To which the retort obvious: Why, then, were the first four questions about Russia's title to the Behring Sea propounded in Article VI. of the Treaty of Arbitration? On the other hand, and also with some insistence, the Counsel for Great Britain protest that the matter "rests, and must rest, for its justification upon the grounds taken in the diplomatic correspondence, and the grounds taken in their libel in the Court." Let the twopenny Justice and the villain fade into the background. The unsoundness of the Justice's judgment matters little. Even the inaccuracy of the villain's translations might go for nought. A deeper question lies behind, in which is involved that constitutional question referred to by Mr. Carter, of the irresponsibility of Governments for the utterances of their Judges when they act upon them to the detriment of the subjects of other Powers.

The proposition is, as the Attorney-General said, somewhat startling that a defendant should be libelled for one offence and be afterwards told that he had committed another offence of which he was never informed, and which he was never called upon to answer. And the proposition is still more startling that a Government should appeal to its Judge to put a municipal statute in force on certain definite grounds, and should then proceed to justify the condemnation on grounds which neither the Judge nor they had ever dreamed of.

V.—The Attorney-General's Argument.

"To all this shadowy claim the Government of the Queen submit but one answer—the law. . . . The whole case, and every part of it, and every form in which ingenuity can frame it, are covered by the law. And to this law her Majesty's Government most confidently appeal."

Such was the text on which the printed argument of Great Britain was based. I propose now to trace in outline the massive ten days' argument which the Attorney-General built upon it. If the area of law covered by the case was, speaking in all soberness, prodigious, so also was the area of historic fact—1799 to 1867—with a fringe at either extremity: with Ukases, Charters, Treaties, and diplomatic correspondence to be unravelled, explained, and discussed. Again, there was the area of present fact, specially pertaining to the cause of quarrel; four years of busy diplomacy, in which, so far as sheer talking went, the verbosity of the late Mr. Blaine had the pre-eminence. And yet, again, there was a third area of fact to be covered, which was also historic and was of considerable extent. The stress of Mr. Phelps's argument is on the "great principle of self-defence" (the case, as you have seen, seems to engender grandiloquence). At a later stage of this article we shall be able to judge how thin a shadow this great principle is; but it was necessary for the advocate who built it up as a wall against which he set his back to shore it up alike with fact and fancy lest it should give way and let him drop into the quagmire of false analogies which he had prepared. There is an abundance of fancy, and eloquent fancy, about Mr. Phelps's methods; "elegant diplomacy" is a term one of his own colleagues bestowed upon it; he will not be offended if I repeat it. This third area of fact included occurrences which the present generation of newspaper readers have never heard of; they were fashioned into glib paragraphs, and being pieced and paged together furnished forth a somewhat appalling addition to the argument. The case of Amelia Island and the adventures of the bold buccaneer M'Gregor in 1817, when Buenos Ayres and Venezuela were insurgent colonies of Spain; the case of the "Caroline," which in 1838 was seized by the Canadian authorities in a United States port, set on fire, and sent over the Falls of Niagara; the punishment of the Pensacola Indians in 1815, and the destruction of forts on the Appalachicola River; the case of Greytown; the British Orders in Council of 1809—all these, and many other incidents of the times

when there was stir and movement in the world, when nations rose and fell, and men fought more and spoke less—all these, and many more, were referred to to build up the "great principle" Mr. Phelps contended for. These incidents added a little glow of romance to an otherwise somewhat ponderous argument; the reading of them took one back to the time when first one read the text-books and was grateful for any dash of local colour. They are dangerous guides, those text-books, in a fight like this. However, the wall had been built of these incidents, and it was necessary to meet them; and the only way to meet them was to take them one by one and to show that individually they had no bearing either on the case or the argument, and that, therefore, collectively they were worse than useless. (This, by the way, is a premiss and conclusion on which some doubt has been thrown in these last days, for in order that you may possess, own, and enjoy flocks and herds it is not necessary that the possession and ownership should extend to the particular animals of which they are composed.) And, in order to show that individually these and a dozen other instances were either quite irrelevant or depended on some other principle, it was necessary to have a mass of original documents and information ready to hand, so that the real facts might be laid before the Tribunal. Seldom, if ever, has the subordinate area of fact in any case been so extended; never has it been grappled with with such conspicuous success. To those who, with some knowledge of legal detail, and from behind the red cord, have followed the conduct of this stupendous case, the manner of its conduct has appeared, in all seriousness, beyond praise. A banality must serve; it reflects the highest credit on the public offices concerned, and (remembering the premiss and conclusion which has been in such jeopardy) higher credit still on those public officers on whose shoulders the burden of the work has fallen.

In order fully to understand the Attorney-General's argument it is necessary to state very briefly the legal positions taken up by the United States. Putting on one side the question of derivative descent from Russia, with which I have already dealt, the property question comes next in order of importance, and this is presented in three forms—property in the individual seal; failing that, property in the herd collectively; failing these, property in the industry, any or all of which properties are said to be recognised alike by the common law, the civil law, by international law, the moral law, the law of nature, and by every other law under the sun. Then follows the question what right there is to protect such property interest as may be found to exist: if there be but an industry and no property in the seals, the right of protection being claimed to extend nevertheless to the subjects of the industry, the seals; the nett result of the contention being that the right to prevent others from killing the seals is claimed, whether there is a property in them or whether there is not. In justification of the seizures, another crabbed question was raised—that the statute, though it may have

been designed to operate over the eastern part of Behring Sea, yet was not a claim of dominion thereover, but conformed to the rule that statutes are confined in their operation to the territory of the nation; if they do in fact extend outside, they do so, with regard to foreigners, not as statutes, but as "defensive regulations"; that this form of *quasi*-legislation is justified by the analogy of many enactments of other countries; and, further, that it may take the form of a statute, or may, without legislative form, be ordered by the Executive.

Such is the structural outline of the case which the ingenuity of the United States Counsel has reared. And it cannot be doubted that the Attorney-General was well advised in taking the line laid down in the sentence from the printed argument which stands at the head of this article. To the claim of the United States Great Britain has but one answer—the law. And he proceeded to elaborate with extreme care every branch of the known law which had any bearing on the American claim and the propositions advanced to support it And to the question Is the claim good? there came from every branch of the law he touched upon the same answer—a decisive, emphatic No. The question of property was perhaps the easiest to clear of fallacies and put upon a firm legal basis. The United States argument ran thus:—"Have we any rights of property at all in the seals? Here, fortunately, we all concede that we have, and it is said that upon the islands these are as much our property as though they were sheep or calves." "Certainly not," interposed the Attorney-General. "Well," said Mr. Coudert, "I gave you credit, and I will take it back. I supposed that when we held the seal in our hands—I supposed when we slit its ear—I supposed that when we could put a brand upon it, that it was our own, as much as it was if it were a sheep or ewe. Where it comes in I am absolutely incompetent to say. I have read the argument on the other side with interest, and I supposed that it was conceded that upon our land, in our hands, under our flag, in our waters, they were as absolutely our property as this book is mine." Shades of Bracton and Blackstone! Shade of Savigny! it was under the wings of your teachings that that interesting argument of "the other side" was written. Do not, gentle spirits, believe of the English lawyers who drafted it that that concession was ever made. The "certainly not" was sharp and crisp enough to dissipate the illusion, and it must have brought peace to you perturbed. From whose ignorance then sprang the supposition? The short dialogue gives the answer; it contains within itself as many and great fallacies as it is possible to cram into the short space of a single phrase. The great underlying fallacy —the seal is like a sheep: *videlicet* a domestic animal. And from this false premiss all the rest followed. The possibility of the seal not being domestic was, it is true, admitted, and here it was argued that the habits and nature of the fur-seal were such as to bring it within the class domesticated, if not the class "domestic"; and that there was no difference between the two,

because there is an exceedingly clear proposition, which is drawn from all the authorities, from the municipal law of many different nations, and which is confirmed by the ancient Roman law: and the proposition is this—that "if by the art and industry of man, wild animals may be made to return to a particular place that the possessor of that place has a power and control over them which enables him to deal with them as if they were domestic animals, they are in law likened to domestic animals, and are made property just as much as if they were domestic animals." And so, it being all so exceedingly clear, Mr. Phelps insisted that "the complete right of property in the Government while the animals are upon the shore or within the cannon-shot range which marks the limit of territorial waters cannot be denied." Is it the law of Wonderland, and is Alice the Queen laying down the law to the Hatter? Propositions stated to be "exceedingly clear," which are clear in nothing but their wrongness; propositions which "cannot be denied" which no lawyer ever heard of before. What does it all mean? Are we at the back of the looking-glass? No, the argument is the argument of learned lawyers of the United States. Let us therefore go solemnly back with the Attorney-General into the regions where law is still of three dimensions.

The complete law as to animals *feræ naturæ* derived from the text-books and certain well-known leading cases was presented by the Attorney-General succinctly in the following way:—

In domestic animals, treated by Blackstone and Kent, as a distinct and well-known "class" of animals, property is absolute.

Animals which are not in this class are wild animals, animals *feræ naturæ*, and in these property is never under any circumstances absolute.

This hard and fast rule is mitigated in several ways. The law does recognise a temporary, or, as it is sometimes called, a "qualified" property in them if a certain condition is fulfilled; that condition is that they should be in possession. During possession the property continues, and is protected by the law; to violate the possession of them is theft. But when possession ceases the property is at an end.

The use of the word property is unfortunate, for it connotes "perpetuality"; hence the effort to qualify it by such words as "qualified" or "temporary." So long as the meaning intended to be conveyed is kept in mind it does not much matter what words are used; but if this meaning is lost sight of many troublesome things follow inevitably—such things, for instance, as the United States argument.

But here the law defines the manner of obtaining this qualified property with some precision. It may be acquired by the two well-known methods of dealing with, or obtaining possession of, wild animals—confinement and reclamation. The former is obviously possession pure and simple. The latter is domestication in its early stages. These two methods are combined

by Blackstone into one, which he calls property *per industriam*. Possession once obtained, it may be preserved in law although in fact it may have been lost. Pursuit, hot pursuit, is sufficient to preserve it, while the pursuit lasts and the animal is in sight of the pursuer. This point had to be considered in dealing with the analogy of the bees which Mr. Carter, the lawyer, had set up. *Animus revertendi* is also sufficient to preserve possession, and on this doctrine all the hopes of United States argumentation were based, for did not the seals, year in, year out, return to the Pribylof Islands, there to submit themselves to the beneficent care, &c.

Now here was a pitfall straight in the way, into which, to my thinking, Mr. Phelps and his colleagues straightway stumbled, thus: reclamation of wild animals means the implanting, developing, training the spirit of return; and seeing that this is the whole and sole feature of domestication, and seeing that it retains possession in law, though in fact possession is lost, and seeing further that when once it is implanted the animal will certainly return from its wanderings abroad . . . . therefore that follows which has already been stated—the class "domesticated" equals in law the class "domestic," and therefore the property in the seals is complete.

Alas for the hiatuses of human argument. The conclusion is unsound. Be the domestication, reclamation, training what they may, assuming that the seals were all fed from a bottle, as little "Jimmy" once was, wherefrom he died, yet the property is never absolute.

But the law has not exhausted its provision for the human hunter. There is a further development in favour of the owners of land. The United States premiss is, as appears from the extracts already given, that the owner of land has an absolute property in the animals on his land. What the law recognises is a right *ratione soli*; which, being translated into legal English language, means the exclusive right to take possession of the animals. And for a very simple reason. People who go upon my land are trespassers, and their act of taking on my land animals alive or dead shall inure to my benefit. This is absolutely all the right which owners of lands or islands, be they Governments, or lessees, or common landlords, have. And this law is to be found carefully stated by the Law Lords in "Blades *v.* Higgs" as clearly as any law on any subject has ever been stated. So clearly, indeed, that the wonder is how the argument of the United States can have proceeded further. They have greater advantages than others to do what—to reduce into possession, to establish property *per industriam*, greater facilities for confining, greater facilities for reclaiming; but the condition paramount to the establishment of this temporary or qualified property is that these facilities should have been enjoyed, that the confinement or reclamation shall have taken place. The distinction, so fundamental to the law, cannot be better pointed than by the common example given by the learned Comyns of fish in a pond and fish in a stew. In my pond

I have the exclusive right to take; in my stew I have already taken. So the whole thing resolves itself into this—that possession is just as necessary to give property to the owners of land as it is to non-owners of land.

And then comes the question, What is possession? Savigny, with marvellous care and learning, has told us. And truly it is a wonderful thing that the extract from Savigny, which Great Britain would quote in support of her argument, was to be found set out and printed in the United States argument. Was an articled clerk turned loose into the Supreme Court library? "Well, it was set out in fairness," said Lord Hannen. Well . . . but with what a strange bedfellow! Here was the law set out, and here was the United States argument. Here was the law insisting on possession not as nine points of the law merely, but as the whole law; and there on the Pribylofs was neither possession, nor anything approaching possession, nor anything like possession, but the seals left to roam the high seas at their own sweet will.

Surely to all this there is an obvious corollary; *animus revertendi* maintains possession once taken; the right *ratione soli* is no more than the exclusive right to take possession; therefore *animus revertendi* has of itself no effect on the right *ratione soli*. It cannot give a greater right to animals off the land than would exist if they were on the land. There is no possession to preserve, and the exclusive right to take is gone.

Has not the question fallen to the ground yet? No. The United States argument dwelt on the force of *animus revertendi* by itself. The string of its virtues was harped on; but, continuing the musical analogy, the tonic, the possession string, was wanting, and the key of property remained undetermined.

But if the United States argument was sound, that old case of the coney-burrows was wrongly decided, or must be ignored, and the case of the grouse, that curious case of "Ibbotson *v.* Peak," and other cases of like nature. The coneys in my burrows must be mine, though they wander abroad; the pheasants I hatch and breed must be mine, and my unneighbourly neighbour the farmer may not shoot them when they fly across his land; and all things wild are tame, and things are not what they seem. And wider consequences still would wait upon this wonderfully strange "award of property" which the United States demand. The penguin and the turtle, the salmon and the guano-gull all would become subjects of property, for they, too, come imperiously upon some nation's shores, and seek protection, and "submit" themselves, and all the rest of it, to the gentle sway of the great killer man.

Though it is so clear, this question of property in the individual, yet it is not necessary to the United States case. Property in the herd, as a whole, is quite enough, and this, again, is clear past all doubting. "The conception of a property interest in the herd, as distinct from a particular title to every seal

composing the herd, is clear and intelligible: and a recognition of this would enable the United States to adopt any reasonable measures for the protection of such interest. . . . While the United States Government asserts and stands upon the full claim of property in the seals which we have attempted to establish it is still to be borne in mind that a more qualified right would yet be sufficient for the actual requirements of the present case. The question here is not what is the right of ownership in an individual seal, should it wander in some other period into some other and far distant sea—that is an inquiry not essential to be gone into—but what is the right of property in the herd as a whole, in the seas and under the circumstances in which it is thus availed of by the United States Government as the foundation of an important national concern?"

Undoubtedly, the recognition of an impossible proposition would render possible a whole series of impossibilities. But surely the answer to all this is comprised in the short sentence:—"But the whole is made up of parts, and if there is no property in the parts, how is there property in the whole?" And yet, again, the ground of argument, this very quicksand of argument, is slipping, slipping slowly away. When it is attacked, even by so simple a method of demonstration, lo! that arch-wizard Mr. Phelps, who is in charge of the United States dissolving views, presents another—not that proposition at all, quite another. That is not necessary at all; but this one—this which I will now show you. If there is no "individual seal property," nor yet any "seal-herd property," yet still the real ground remains, property in the industry.

Then comes the "husbandry argument," introduced as so identical with the "property in the individual seal argument" already noticed as to be almost indistinguishable. "You may state another proposition fully substantiated by these authorities" (those authorities, that is to say, which so fully demonstrate the essentiality of possession). "It is scarcely another proposition; it is almost the same thing, but the language is in a different form—that whenever man is capable of establishing a husbandry in respect of an animal commonly designated as wild, such a husbandry as is established in reference to domestic animals, so that it can take the increase of the animals and devote it to the public benefit by furnishing it to the markets of the world, in such cases the animal, although commonly designated as wild, is the subject of property, and remains the property of that person as long as the animal is in the habit of voluntary subjecting himself to the custody and control of that person." Well, well, well, let us be serious and talk "law." What does it mean, property in an industry? And what is this precious industry? Waiting till the seals come to the islands, and then knocking them on the head. In doing this they are exercising their right as owners of the islands; nobody disputes their right. They may knock the seals on the head in their territorial waters,

and may exclude all others from that area. In common with all others they may catch the seals upon the high seas. But beyond these, what? And if the answer is, as it must be, "Nothing," then comes the fatal question—"Where, then, is the legal right invaded by the pelagic sealer?". Show first your legal right, and then you may proceed to show the invasion of it. First the *injuria*, then the *damnum*; or, if you will, first your *damnum*, and then the *injuria*; but the one or the other by itself shall not suffice you, for the sake of that old maxim of our law, *ex damno sine injuriâ non oritur actio*. The whole thing resolves itself, therefore, into a question of rival trading, and, no malice being either alleged or shown—as how, indeed, could there be alleged that a "certain class or set of men had, for the malicious purpose of injuring the lessees of the Pribylof Islands, and not in regard to their own profit and industry and in exercise of their own supposed rights, committed a series of acts injurious to the tenants of the Pribylof Islands"?—the case, had it been a common law action between the owners of two neighbouring islands, would have been at once withdrawn from the jury; for the rights of rival traders have been settled long ago—were settled in law, indeed, when Mr. Keeble and Mr. Hickeringill were fighting over the rights of an owner of decoy ponds; and Lord Chief Justice Holt in deciding that dispute put the matter neatly, after his manner, in a nutshell:—"Suppose the defendant had shot in his own ground; if he had occasion to shoot it would be one thing, but to shoot on purpose to damage the plaintiff is another thing and a wrong."

But, after all, this was but the appeal to the ordinary principles of common law, the law as laid down in the cases—those cases cited for some occult purpose by the United States, for they all supported or seemed to support the British position. But they were bottomed, all these great principles for which the United States so vigorously contended, also in international law; and international law is moral law, and international law is natural law (for did not Puffendorf write on the Law of Nature and Nations?), and again we slide off into the infinite; again we ascend with Mr. Carter "into the mists and clouds of metaphysical and ethical discussion." But the question may well be asked, What has international law to do with the question in dispute? Rights of property dependent on international law! A substantive international law of property! One must keep one's juristic gravity. What is the international law of property as distinguished from the municipal law of property? Is there an international law of contracts? Is there an international law of torts? Where is all this law to be found? Are things getting dissolved in view again? Is it possible that the seal is an animal *feræ naturæ* by common law, but *mansuetæ naturæ* by international law? Surely, this was the drift of the Attorney-General's argument, if this appeal to international law means anything, it must mean this. If the possibility were to be admitted for a moment that such a proposition could come within the range of

international law, the test of Grotius would be sufficient for an immediate solvent: *placuitne gentibus?* Have the nations agreed to treat the fur-seal as an animal, or as belonging to a class of animals, the subject of property? The question will not bear serious consideration for a moment. "Title in things," said the Attorney-General, "must take its root in municipal law," and the demonstration is complete "that municipal law does not support this claim, but negatives it."

The appeal to international law was perhaps the weakest part of the United States argument: conflicts between nations do not of necessity draw with them the application of international law, and this case could not be treated otherwise than as a claim would be treated by a private owner of the islands to assert a right of property in the seals while they were in the adjoining ocean. "Is there any ground conceivable for treating the question in a different way because the United States happen to be the owners of the sovereignty over the islands, and have given to their lessees the right to take these seals on the islands? It is impossible that property should exist in one case and not exist in the other, or that property should be non-existent in one case if it is not also non-existent in the other."

International law was an *ignis fatuus* which led the United States Counsel dancing over the morasses in which, unfortunately, the foundations of institutions and of things in general seem to be laid. The "Book of Nature" was quoted long ago in Court; and since Lord Ellenborough ruthlessly asked for chapter and verse, page and edition, none have dared in Courts of Law to cite that authority again. The heresy too of Puffendorf and his kind was exposed long ago; Bentham, Ortolan, and Austin have blown it to the winds; the nut scarcely needed such heavy hammers for the cracking, yet the Attorney-General could not but use them:—"They substitute for the reason of experience all the chimeras of their own imagination. . . . . They have confounded positive international morality, or the rules which actually obtain amongst civilized nations in their mutual intercourse, with their own vague conceptions of international morality as it ought to be, with that indeterminate something which they conceived it would be if it conformed to that indeterminate something which they called the law of nature." Do we not once more hear the sound of the vanished master's voice? Once more the great student puts a weapon into the hand of the great advocate, and the weapon pierces the bladder with remorseless effect.

VI.—The Attorney-General's Argument, Continued.

And now we reach the zenith of the United States argument; assume we have established something, even though it be but an "industry," and assuming further that it is injuriously affected by the pelagic sealer, we have a right to protect that industry and prevent that injury from happening.

The Attorney-General's attack on this position was directed at first, of course, against the first assumption. "It is obvious that if I have succeeded in establishing that there is no right to protect, it becomes quite unnecessary to consider what are the rights of protection." But though the case might have been rested there, it was impossible to pass by Mr. Phelps's elaborate argument contemptuously, and therefore the question had to be seriously argued.

Now what was the claim of protection which the United States made? To search, to seize, to condemn to confiscation the ships, and to imprison the subjects of a friendly Power in the piping times of peace. A claim so large must necessarily be supported by precedent; and that long list of cases already alluded to was brought out to support the claim. It is true that many things have been done in the almighty name of war at many stages of the world's history; nay, more, that some have been and do stand justified before those Tribunals which have the deeds of war in charge: that there is a law which those Courts administer and which deals with war, and which it may justly be said is bottomed on, recognizes indeed the principle of, self-defence. The fundamental fallacy in this connexion is found in the proposition that a State has in time of peace a right under international law, and in its full rights of self-defence and self-preservation, to do on the high seas whatever it may conceive to be necessary to protect its property or its interests. That I conceive to be an unsound proposition. It makes the rights in time of peace the same as the rights in time of war." But the fundamental fallacies do not end here; a vicious trail of fallacious analogy ran through the application of all the cases cited. The argument "confused a variety of actions upon the part of States, and treats them as if they were all of the same character, to be explained and defended upon the same grounds, although, in fact, they are different in character and are defensible or are explicable by very various reasons."

It would be impossible to condense the answer into a neater or happier sentence than the Attorney-General's short summary:—"My learned friend

in his argument has confounded acts done in a state of belligerency with acts done in time of peace; and, further, he has confounded acts which a nation will do in defence of what it conceives to be its interest with what it may legally do under the sanction of international law." The nut cracked, here was the kernel of the whole matter. Some things are lawful for belligerents to do; the stern necessities of war impose duties even on neutrals, duties which the Tribunals of war will enforce. And some things are not lawful; yet there is an imperious necessity which impels nations, and men too, to do them and stand the racket. If there is no other way out of the difficulty, the thing will be done and the consequences taken so long as the imminent danger be averted. Could a better example be found than the case of the "Trent"? The seizure of Messrs. Mason and Slidell on board the neutral "Trent" was as wrong, as unlawful by international law, as a thing could be. The coaling of Her Majesty's ships of war would have been the inevitable consequence had not the men been released. There cannot be, nor ever was, any pretence for saying that there was any doubt about the illegality of the seizure, but the Federal Government did it deliberately, running the chance of war, in view of something which seemed to them an imminent peril, and when the peril had passed away they the more willingly released the men. "It is an illustration," said the Attorney-General, "of the case in which a nation puts itself outside international right, and where the only defence of its position must be that it considers itself morally justified in doing the thing, and is prepared, if necessary, to fight in defence of having done it."

But the law takes regard of imminent peril, and justifies certain acts where something which may properly be regarded as instant action is necessary to avert it. The old Italian writer Azuni cites as examples of this principle jettison, the demolition of a house to prevent the spread of fire, taking one's neighbour's timber to raise the bank of a stream which is on the point of overflowing. In such and similar cases it is enough to repair the damage in order to prevent complaint. And the same rule may be applied to nations. The principle was, indeed, laid down by Mr. Webster in the correspondence between the United States and Great Britain in the case of the "Caroline"; there must be "a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation; . . . an act justified by the necessity of self-defence must be limited by that necessity and kept clearly within it." But apply this principle to the Behring Sea seizures, nothing can be clearer than the fact that it was a case "where there was no such instant overwhelming necessity of self-defence, where there *was* time for choice of means, where there *was* time for deliberation, where there *was* time for diplomatic expostulation and representation.

And the corollary of the principle is that cut-and-dried rules, the haling before the Courts to receive sentence of fine and imprisonment, the whole procedure laid down by statute, were utterly at variance with the notion of

that instantaneous, spontaneous, almost automatic act of self-defence which the law recognizes; for otherwise, how could the act be limited by the necessity and kept clearly within it?

And if the case is deprived of any help from this principle it falls, and must fall, outside the domain of law altogether. The United States might choose to regard the interests of fur-sealing as of so much importance that they would assert, right or wrong, their claim against the world to protect the fur-seals in Behring Sea. But that would be war. And so, too, Great Britain might consider the interests involved in this question as of so great an importance, not merely to the interests of the Canadians, but in view of the broader and greater principle involved—the equality and freedom of nations on the high sea—that she would defend her ships by force. But that, again, is war. That is not international law; that is not international right; and that is not the character of the question which this Tribunal has been invoked to determine.

This question glides almost imperceptibly into the next, which is the most curious, not to say original, part of Mr. Phelps's argument. The interpretation put by Judge Dawson upon the Alaskan statute involved two points—first, that the term "waters of Alaska," within which the killing of fur-seals was prohibited, comprised all the waters of Behring Sea to the east of the line of demarcation drawn by the Treaty of Cession of 1867; secondly, that the prohibition applied to foreigners.

In dealing with this interpretation two principles stared Mr. Phelps in the face—legislation never is extra-territorial unless it is so expressed in definite terms; if it is so expressed it is limited to subjects. Now here were the horns of a dilemma. If the Judge was right as to the construction of "waters of Alaska," an unwarranted assumption either of dominion or of jurisdiction was involved. If the limit of territorial waters was observed, the statute, though it could apply to subjects, could not apply to foreigners without violating a principle fundamental to legislation. How, then, were foreigners to be included in the punishment imposed by the law and yet preserve these two principles intact, the clearness of which the United States admitted—nay, wondered why they were ever referred to? And this was the seat which Mr. Phelps found for himself between the horns. As to these statutes, "within the territory where they prevail, and upon its subjects, they are binding as statutes, whether reasonable and necessary or not. Without, they become defensive regulations, which, if they are reasonable and necessary for the defence of a national interest or right, will be submitted to by other nations, and if not, may be enforced by the Government at its discretion." Was ever so strange a proposition propounded by learned Counsel or Professor? If it were not irreverent it might be put in the form of an ancient conundrum—When is a statute not a statute? To which the answer, When it is a defensive regulation. But even taking it *au plus grand serieux* it is only a proposition to be

brushed aside as unheard of and unsound. Is there any precedent in any book of authority or in any international controversy in which such a proposition has ever been advanced? Surely the Attorney-General was right in posing this as the first question which must engage the attention of his learned friend, when the time came for him to answer. And then there is the question already propounded in connection with the general subject of self-defence,—Does not the very idea of defensive regulation, or defensive act, or self-preservative act, repel the idea of cut-and-dried, formulated rules? The occasions for acts of self-defence are occasions of sudden emergency. And, further, how would a Court act if it were called upon to enforce such a defensive regulation? Would it not—for the principle governing the law of self-defence has already been laid down—would it not consider "the circumstances of the case, the character of the emergency, and the character of the sanction which by international law would follow upon the act done if it were not justified by the circumstances of the case? But here is a cut-and-dried statute, which tells the Judge that the consequences of the act on which he has to adjudicate are confiscation of the ship, imprisonment of the men—imprisonment not exceeding a definite term—or imposition of a fine not exceeding a definite amount. This argument of a self-defensive regulation is an ingenious after-thought, creditable to the subtlety of the minds which have invented it."

Mr. Phelps, however, was not content with the mere propounding of such a theory; he insisted, as he insisted with regard to his major proposition on the right of self-defence, that he was supported by analogy. And this time, in search of analogies, he roamed from Ireland to the China seas; glancing at the White Sea and the Norwegian fiords, he passed rapidly to the ancient pearl fisheries of Ceylon, and thence to the newer bêche-de-mer fisheries of Australia; touching the northern island of Japan, he darted southward again to Mexico, Uruguay, and Panama, then northward to the Jan Mayen fisheries off Grenland, and so home to the islands of the Behring Sea. And in this rapid survey of the world he had noted specially how Legislatures under different circumstances and different suns had dealt with fish of sorts, with fisher-folk in general, and in special with foreigners who sought fish in the deep waters adjacent to national territory. And the unanimity of action was remarkable. Was it to be suggested even that where close times had been enacted nationals were excluded from the fisheries while foreigners were allowed to take with impunity, and this merely because of the hard-and-fast rule as to the territoriality of legislation? The thing was ridiculous, and the answer so simple. Why, within the jurisdiction and for subjects the statutes were statutes; but without the jurisdiction for foreigners they became defensive regulations. It seemed a pity to have to demolish so pleasant and pretty a theory, but it had to be done, and every brick of the edifice was carefully taken out, examined, and found absolutely useless for the purpose

for which it had been used. As it had been with the Greytown and Appalachicola river analogies, so it fared with the legislative analogies. Some were found to be strictly confined to territorial waters, others to national ships; some were to be found sanctioned by prescriptive claim to embayed waters, and some few, which dealt with oyster, pearl, and coral beds, and which stretched a few miles into the sea, found an ample justification in the nature of the subject-matter of the legislation and the principle that the physical occupation of the bed of the sea is justified. But of analogy with the great claim in Behring Sea not a shred, and of support to this wonderful new principle of Mr. Phelps not a vestige.

Mr. Phelps's analogical powers were not yet exhausted. The Hovering Acts, the St. Helena Act of 1815, and the Quarantine Acts were pressed into the service. A short argument sufficed to dissipate any faint resemblance which might have seemed to exist. The Hovering Acts, passed by many nations for the prevention of smuggling, are, to a certain extent, independent of the three-mile limit; but beyond this all resemblance either of fact or of principle ceases. They simply deal with the prevention of offences within the jurisdiction, and with ships proceeding to the territory of the country to commit them. The Quarantine Acts are of the same nature. "Parliament," said Chief Justice Cockburn in The Queen *v.* Keyn, "has a perfect right to say to foreign ships that they shall not, without complying with British law, enter into British ports, and that if they do enter they shall be subject to penalties unless they have previously complied with requisitions ordained by the British Parliament." And as for the Act passed to prevent the escape of Napoleon from St. Helena, and which to that end prohibited hovering within eight leagues of the coast, the analogy was so far-fetched that it was almost impossible to treat seriously all the bombastic nonsense Mr. Blaine had written about it. But history is made up of many incidents, and some drop out and are forgotten till the moment comes after many years to call them to remembrance. This Act was the result of an understanding between the allied Powers, which was embodied in a Treaty, by the second article of which the custody of their prisoner was specially entrusted to the British Government. The United States was not one of the allies, but a Treaty of commerce was at that time being concluded between Great Britain and the States; and the ratifications were exchanged only after an express understanding that the liberty which it granted to United States vessels of touching for refreshment at the island was to be considered in abeyance so long as it should continue to be the residence of the Emperor.

But it seemed lost labour to spend so much time sweeping away the analogies with so much care that no speck of them remained, when behind them all was that extraordinary contention, broadly, roundly, squarely stated, that the rights of defence are the same in time of peace as in time of war—that is, that they involve, if need be, search and seizure upon the high sea;

condemnation before tribunals, which the United States Counsel persisted, to show their logic, in calling "Prize Courts" (but for which the Attorney-General substituted "War Tribunal"); imprisonment. . . . . Have the names of Sir William Scott and Chief Justice Marshall lost their power to charm? There is no mistaking their language:—"If it be asked why the right of search does not exist in time of peace as well as in war, the answer is prompt—That it has not the same foundation on which alone it is tolerated in war—the necessities of self-defence. They introduced it in war, and practice has established it. No such necessities have introduced it in time of peace, and no such practice has established it." Such has been the language of every Judge who has spoken on the subject. And as if this was not enough, if it were necessary to pile Pelion on Ossa, there were the utterances of Presidents and Secretaries of State (carefully arranged in chronological order right through the years of the century) resisting, or protesting against search in time of peace, through which the words of the Judges echoed and re-echoed:—"The right of visitation and search is a belligerent right, and no nation which is not engaged in hostilities can have any pretence to exercise it upon the open sea." "Any visitation, molestation, or detention of vessels bearing the American flag by force, or by the exhibition of force, on the part of a foreign Power is in derogation of the sovereignty of the United States." What the United States protested against at the time of the Ashburton Treaty it claimed to exercise in defence of some shadowy right which it was not necessary to put higher than, nor indeed could be put higher than, the right to an industry which every other industrial worker in the world possesses; in defence of this supposed right it asserted the legal power to exercise "those acts of high authority on the high seas which are only permitted by international law to belligerents, or only allowed to be exercised against pirates, with whom no nation is at peace."

The violation of the freedom of the seas has led, and will lead, nay, must lead, to war; the submission to arbitration is a victory for peace. The award will be a victory for peace, too, if, "it conform to and leave untouched and undoubted the principles of that law which have been consecrated by long usage and stamped with the approval of generations of men—that law which has, after all, grown up in response to that cry of humanity heard through all time, a cry sometimes inarticulate, sometimes drowned by the discordant voices of passion, pride, ambition, but still a cry, a prayerful cry, that has gone up through all the ages, for peace on earth and good will amongst men."

REGULATIONS PROPOSED BY THE UNITED STATES.

"The Government of the United States, in the event that the determination of the High Tribunal of certain questions described in the Seventh Article of the Treaty as 'the foregoing questions as to the exclusive jurisdiction of the United States' should, as mentioned in said Seventh Article, 'leave the subject in such a condition that the concurrence of Great Britain is necessary to the establishment of Regulations for the proper protection and preservation of the fur-seal in, or habitually resorting to, Behring Sea,' submits that the following Regulations are necessary and that the same should extend over the waters hereinafter in that behalf mentioned:—

"First: No citizen or subject of the United States or Great Britain shall in any manner kill, capture or pursue anywhere upon the seas, within the limits and boundaries next hereinafter prescribed for the operation of this regulation, any of the animals commonly called fur-seals.

"Second: The foregoing regulation shall apply to and extend over all those waters outside the jurisdictional limits of the above-mentioned nations of the North Pacific Ocean or Behring Sea which are North of the thirty-fifth parallel of North latitude and East of the one hundred and eightieth meridian of longitude West from Greenwich. Provided, however, that it shall not apply to such pursuit and capture of said seals as may be carried on by Indians dwelling on the coasts of the territory either of Great Britain or the United States for their own personal use with spears in open canoes or boats not transported by, or used in connection with, other vessels, and propelled wholly by paddles, and manned by not more than two men each, in the way anciently practised by such Indians.

"Third: Any ship, vessel, boat or other craft (other than the canoes or boats mentioned and described in the last foregoing paragraph) belonging to the citizens or subjects of either of the nations aforesaid which may be found actually engaged in the killing, pursuit or capture of said seals, or prosecuting a voyage for that purpose, within the waters above bounded and described,

may, with her tackle, apparel, furniture, provisions and any seal-skins on board, be captured and made prize of by any public armed vessel of either of the nations aforesaid; and, in case of any such capture, may be taken into any port of the nation to which the capturing vessel belongs and be condemned by proceedings in any court of competent jurisdiction, which proceedings shall be conducted, so far as may be, in accordance with the course and practice of Courts of Admiralty when sitting as Prize Courts."

REGULATIONS PROPOSED BY GREAT BRITAIN.

1. All vessels engaged in pelagic sealing shall be required to obtain licences at one or other of the following ports:—

Victoria, in the province of British Columbia.

Vancouver, in the province of British Columbia.

Port Townsend, in Washington Territory in the United States.

San Francisco, in the State of California, in the United States.

2. Such licences shall only be granted to sailing vessels.

3. A zone of twenty miles around the Pribylof Islands shall be established, within which no seal hunting shall be permitted at any time.

4. A close season, from the 15th September to the 1st of July, shall be established, during which no pelagic sealing shall be permitted in Behring Sea.

5. No rifles or nets shall be used in pelagic sealing.

6. All sealing vessels shall be required to carry a distinguishing flag.

7. The masters in charge of sealing vessels shall keep accurate logs as to the times and places of sealing, the number and sex of the seals captured, and shall enter an abstract thereof in their official logs.

8. Licences shall be subject to forfeiture for breach of above regulations.

VII.—Regulations.

COMPLETE prohibition of pelagic sealing within four million square miles of sea. Such is the simple little regulation which the United States proposes to the Tribunal as the solution of the whole matter.

Four million square miles of broad Pacific Ocean put under the ban! and within that area it is contemplated that "if citizens or subjects of the United States or Great Britain shall in any manner kill, capture, or pursue any of the animals commonly called fur-seals, the ships found engaged in such capture or pursuit, or prosecuting a voyage for that purpose, may, with their tackle, apparel, furniture, provisions, and any seal-skins on board, be captured and made prize of by any public armed vessel of either of the two nations, and may be taken into port and be condemned by proceedings conducted so far as may be in accordance with the course and practice of Courts of Admiralty when sitting as Prize Courts."

In order to consider the matter quite calmly and dispassionately, let us first take a map and colour in the area red, just to realise the extent of it. It is as big as Europe with the Mediterranean Sea thrown in. To this it is necessary to add, for the benefit of those who have not had the pleasure of studying seal-charts, that the waters which are "north of the 35th parallel of north latitude and east of the 180th meridian of longitude west from Greenwich" include the whole migration route of the so-called Alaskan seal-herd as laid down by the United States.

One further point only needs to be remembered in order fully to realise the true nature of the United States proposal. The question of regulations is to be considered only in the event of the questions of right being determined in such a way that the concurrence of Great Britain is necessary to their validity. So that the condition precedent to the consideration of this question is the negation of the right of property or protection, which the United States claims.

Now, if in the wilder moments of a dream it were possible to imagine that this claim to property had found its warrant in law, it would carry with it, if not an inherent right of protecting the property in its wanderings, at least a right to claim from the Tribunal the protection of stringent regulations—the complete prohibition of pelagic sealing. And the area of this protective prohibition would obviously cover that area of sea through which the

wanderers regularly travel. At the very outset, therefore, the nature of the United States demand is brought home to us. With property negatived, they claim precisely what they would be entitled to demand if property had been affirmed, with this addition, that Great Britain shall assist in enforcing a regulation which can only inure to the sole benefit of the United States. Mr. Phelps has made a great point in his argument that the British case from the first has been nothing more than an elaborate defence of the pelagic sealer. *En revanche*, the suggested regulation appears to be only a scheme for the complete annihilation of the pelagic sealer. Now, if we look at the question merely from the point of view of the pelagic sealer, one point inevitably comes uppermost. The dispute between the two countries was about part of Behring Sea; *qu'allait-il donc faire dans cette galère de Pacifique?* Is it not a little bewildering to find that the mouse has brought forth the mountain?

The Behring Sea dispute in many of its aspects needed serious disputation; but how could it engender regulations operating outside the area of the dispute; to put it technically, how comes it that the Tribunal has jurisdiction to entertain, much less to adjudicate upon, any question which is not confined, and rigorously confined, to Behring Sea? It seems strange that, when a dispute has arisen about a given subject, the settlement of it should deal with a much larger subject; and yet this is precisely what the United States have asked by their extraordinary scheme of regulations. The dispute was as to the rightfulness or wrongfulness of pelagic sealing in Behring Sea, and in Behring Sea alone; that was the question, the whole question, and nothing but the question. When Great Britain suggested that the *modus vivendi* of 1891 should include the western as well as the eastern part of Behring Sea, it was from the United States that the answer came, that it was never supposed that an agreement for a *modus vivendi* could be broader than the subject of contention; and yet again on another occasion it was the United States Minister who was "directed to say that the contention between the United States and Great Britain has relation solely to the respective rights of the two Governments in the waters of Behring Sea outside ordinary territorial limits, and the stipulations for the co-operation of the two Governments during this season have, of course, the same natural limitation." And so now, when this vast area of the Pacific is brought within the United States claim, and under the condition which cannot be too often insisted on, that they have no right or title at all to the seal, Great Britain replies that the area of the dispute was Behring Sea, and that the area of its settlement must be coincident.

So strange a proposition deserves repetition. A dispute as to the lawfulness of pelagic sealing in Behring Sea; an interminable discussion as to whether the United States had any right to act as they had done in Behring Sea; no question as to the legality of pelagic sealing in the broad waters of

the Pacific south of the Aleutian Chain, for the very obvious reason that they were the broad waters of the Pacific and nobody had asserted exclusive jurisdiction over them; and, for all the inhumanity, and barbarity, and shocking cruelty, and all the rest of it, the Government of the United States had never attempted, as they might have done, to stop their own citizens from perpetrating these monstrous acts there, from acting as *hostes humani generis*; and yet, when the question in dispute is submitted to arbitration, it is proposed that the result of the settlement should extend outside Behring Sea, and extend outside, too, when the "fatuous flame" of United States rights had been extinguished. As the British Counsel pointed out, if the Court has jurisdiction to make regulations outside Behring Sea, Great Britain would be worse off if she won on the questions submitted to arbitration than if she had never consented to the reference. And if on general considerations the proposal seems impossible, on the special considerations arising from the terms of the Treaty of Reference it seems still more impossible. Regulations are to be made if the determination of the questions of right leaves the question in such a position that the concurrence of Great Britain in them is necessary; "concurrence necessary"—that is, by reason of the freedom of ships upon the seas. What else could the words mean? But as to Behring Sea there was a dispute on this very subject; the question had been deliberately raised by the claim of exclusive jurisdiction in Behring Sea, whether ships were free in Behring Sea. If that claim were upheld by the Tribunal there would be no need for "regulations," because then the United States could pass her own laws for that area; but if that claim were denied there would have to be "regulations" made by the Tribunal to which the concurrence of Great Britain would then be necessary, and which she is in fact by the Treaty pledged to give. The regulations article of the Treaty begins with an "if"; there was a contingency as to this concurrence of Great Britain being necessary; and the argument is that this limits to Behring Sea the area to be made subject to regulations, for the simplest of reasons, that outside Behring Sea there is no "if" at all about the matter; the concurrence of Great Britain would be necessary always, and under every circumstance. The virtue of this "if" is, therefore, that it embodies the condition precedent for diminishing the freedom of the Behring Sea for British ships. If the United States' claim of exclusive jurisdiction is upheld, that freedom is at an end; if the claim is denied, her consent is required before that freedom can be diminished. But, once more, if the regulations may be made outside Behring Sea wherein there was no contingency to be determined on, the condition precedent of the regulation article becomes mere superfluity, mere absurdity. A minor point on the construction of the article deserves a passing reference—the regulations are to be made "for the proper protection and preservation of the fur-seal in or habitually resorting to the Behring Sea." The American argument is that, because the seals in the Pacific "habitually resort" to Behring

Sea, therefore when they are in the Pacific they may be protected. It is as if power were given to the municipality of Paris to make regulations for the health of people in or habitually resorting to that city. How could it be argued that the regulations should extend to those habitual resorters while they are yet in London?

But the question of regulations must obviously be considered on a broader ground, the necessity—admitted by both parties, by Great Britain as sincerely as by the United States—of preserving the fur-seal from extermination. The previous discussion will have indicated clearly the British argument as to what ought to be the key-note of any scheme of regulations which shall be "just and equitable" to both of the great disputing parties—parity of interest. The object of the regulations is the preservation of the fur-seal, so that both interests may continue to be exercised. It is this point, which, as it would seem, the United States advisers have never brought themselves to realise; the failure to recognise its just necessity is the vice which has disfigured all their arguments on the subject.

The fact has already been insisted on that the alleged necessities of this preservation are precisely identical with the admitted necessities of property if it existed. It is impossible to resist the inference that interest in the fur-seal's preservation is only the property claim in another form; and, indeed, in Mr. Phelps's argument, "preservation of the fur-seal" and "preservation of the United States industry from injury" seemed almost interchangeable terms. The American argument seems, indeed, condensed in this single sentence—"Give us regulations"—that is, "give the United States the regulations for their protection." And, indeed, the suggested regulation, if it were imposed upon Great Britain, would create for the United States just that monopoly in the fur-seal industry which the failure of their property and exclusive jurisdiction arguments (the hypothesis, be it remembered, on which regulations come up for discussion) has prevented their establishing. The British suggestion has been criticised as insincere. Is there not a touch of insincerity in the United States suggestion? And, if the end for which it was introduced is insincere, all the arguments used to advance that end are tainted. All the sentiment about inhumanity, barbarity, slaughter of gravid females and nursing mothers seems, to say the least of it, strained; that lurid picture of the schooner decks swimming in milk and blood seems to derive some of its tints from the coloured fires of Mr. Carter's oratory. Is there more inhumanity in pelagic sealing than there is in the chase of any other wild animal? Is not the *tu quoque* fully warranted, "What about the buffalo and the passenger pigeon?" And, if there is no real inhumanity, and if all the natural history in the American case is too high-strung, the need for this extended area of protection vanishes at once, and we are left face to face with the one necessity of this branch of the case, the regulations which shall be just and equitable, and which shall recognise parity of

interests; and, recognising parity of interests, shall not promote or foster directly, much less indirectly, an exclusive interest.

The object, then, which the regulations have in view is the preservation of the fur-seal, and Great Britain has been as zealous in suggesting means to this end as the United States. To the mere suggestion of this the United States retort—How can you be sincere when you raise a technical objection to regulations which are to operate in the very place where regulations are most needed, the Pacific Ocean, where all the gravid females, &c.? It is a serious objection on the face of it, but it is capable of the most direct and complete answer.

In the first place, it entirely misconceives the British position. The correspondence shows in the clearest manner possible that, as soon as the questions so deliberately raised by the United States were out of the way, the desire of Great Britain was that the whole question of the preservation of the fur-seal should be dealt with comprehensively, and without limit as to any particular seas or islands. Clear away all the pretensions of exclusive jurisdiction and property, and Great Britain was as desirous of attaining that end as the United States; she was willing on her side to submit the rights of her sailors in the Pacific to regulations, if the United States, on the other side, would submit to regulations on the islands. If either set of regulations was omitted the preservation scheme would be incomplete, and, if incomplete, how could it be the scheme which was necessary to the occasion, apart altogether from the fact that such a scheme would foster the monopoly which the United States so much desires, and the right to which has, when regulations are approached, been negatived. No, the simple position of Great Britain has been all along that the rights of the two countries should be brought into hotchpot; that the parity of interests should be subjected to parity of rules. As it seemed to Great Britain, there could be no other way of dealing with the only rights which remain when the rights claimed by the United States were negatived—the right, that is to say, of the pelagic sealer to catch what he can; the right, the exclusive right, of the island sealer (that is, the Government of the United States or its lessees) to catch the seals while they are on the islands. Admit the necessity of regulations to be great; the necessity of enforcing them against the island sealer is all the greater for his boast that he could utterly destroy the herd upon his islands.

But the United States have resisted, and still resist, island regulations in any form whatever. They have contended, not without some show of plausible reason, that the Tribunal has no jurisdiction to make regulations for the islands, for the words of the Treaty are clear—"The Arbitrators shall then determine what concurrent regulations outside the jurisdictional limits of the respective Governments are necessary, and over what waters such regulations should extend." But is not the answer complete? Be it so;

bind the Tribunal by the words of the Treaty, if you will. They have it in their power to decline to make regulations at all if they are likely to be ineffective in achieving their main purpose—the preservation of the fur-seal; and they are not only unlikely to achieve that end, but they cannot do it unless they include every place to which the fur-seal resorts; unless they include that very place where, as you say, you can destroy every seal that comes on the islands. They are not necessary at all outside the jurisdictional limits of the respective Governments, if the one factor of destruction remains unregulated within the jurisdictional limits of one of the Governments. It is not enough to say that self-interest will compel the United States to preserve the seals on the islands. It has proved insufficient in the past; it may prove insufficient in the future. Unless, therefore, of their own free will the United States come into the scheme, it cannot be other than imperfect and unnecessary; and a refusal to make regulations which travel one inch outside of the original area of dispute, and within which Great Britain has practically consented to regulations, would seem to be at least a course which the Tribunal may consider itself compelled to adopt.

VIII.—The Award.

So, it is all over. And Great Britain may shout "*Io pæan!*" But though she shout it somewhat loudly for awhile, she will not add to it "Woe to the conquered!" The gloves will be taken off, and put by to await the settlement of the next cause of quarrel between the cousins.

And, speaking of cousins, it may be well to insist on a point which the United States too persistently forgot throughout the whole of the proceedings. The Counsel on the other side dwelt too much on the fact of its being a "colonial cause of action"; one which Great Britain would not have been a party to if she could have helped it, or, being a party, would have settled quickly in the gate if she could have had her own way. There was too much commiseration for Great Britain on the part she had to play. The United States have to learn, nay, have already learnt, that the cause of the Colony is Great Britain's cause, and Great Britain's cause the Colony's; that the cousinly relationship extends to the whole family, and that the British motto is "Any number joined in one."

But, putting on one side this little matter of forgetfulness, it will be well, before the Ukases, and the Charters, and the Treaties, and all the polite correspondence are put back upon the shelves where dust and moth accumulate, and where readers never pry—it will be well to glance lightly over the points which the Award has settled. If only for this reason, that it is something to think that here are certain questions which may never, while life remains, be re-opened, diplomatically or otherwise; that there are some matters which are now, for good and all, definitely, finally, utterly, irretrievably settled and past praying for.

The now celebrated "five questions" have been so often stated that it is needless to re-state them. The briefest summary of the answers will serve my purpose. The first answer (Senator Morgan *dissentiente*) declares that, save for that momentary assertion of jurisdiction in 1821, Russia never asserted in fact nor exercised any exclusive jurisdiction in Behring Sea or any exclusive rights in the seal fisheries therein beyond the ordinary limit of territorial waters. This answer disposes at one fell swoop of some sixty-eight years of history. It brushes away with a light hand the contention that Russia ever persisted in that extraordinary claim which she made by the Ukase of 1821, to a jurisdiction over a hundred Italian miles to seaward

along the coasts of Asia and America and the Aleutian Islands, over which she then asserted sovereignty. It declares that she abandoned that claim entirely, and rested thereafter content with the territorial waters recognised by international law. It disposes of the contention that the protest which the United States made to that Ukase was limited to the shores south and east of the Aleutian Islands, inferentially putting, so to speak, its finger upon the weak spot of the contention—"What did John Quincy Adams mean by saying that the United States could admit no part of a claim which extended from Behring Straits, down to 51° north latitude, if he did, as you assert, in fact admit so much of it as applied to the shores of Behring Sea?" And it does something more; it restores language to its normal meaning, and so gives us back the breath which Mr. Blaine's argument as to the meaning of this old correspondence had fairly taken away. So much for the maritime jurisdiction. Then as to the fur-seal fisheries, it deals in the kindest way imaginable with that *quasi*-historical fact, which Veniaminof recounts, that Captain Pribylof tracked the seals to their home upon those islands which thereafter bore his name; and as to Russia's exclusive rights in those fisheries, either asserted or exercised, it brushes all the evidence (though indeed there was very little which merited that name) away as not establishing the point. It of course disposes also of that clever *aliter* which Mr. Phelps produced by way of argument, when it became only too apparent that the derivative descent idea must be abandoned—that *quasi*-prescriptive claim which asserted as its basis of fact that Russia had done in all those years, in the way of "cherishing" the fur-seal and "fostering" the industry and protecting it, precisely what the United States was doing, or endeavouring to do, now. As the Award merely ignores this argument, of the two suppositions —that the facts were not as stated, or that if they were as stated they were irrelevant—we may choose the latter as being more consistent with the law of the matter. So much for question number one.

Senator Morgan still breaks the harmonious unanimity by dissenting from the answer to the second question, which declares that Great Britain neither recognised nor conceded any claim of Russia to exclusive jurisdiction in the seal fisheries outside territorial waters. If there were no claims, well "these claims I cannot recognise because they were never made," seems sufficient to dismiss the matter from our minds. Of course there were further questions wrapped up in this second question. Supposing the claims had been made, and supposing Great Britain had recognised them and conceded them, what then? Or again, supposing the claims had been made, and supposing (what was indeed the likelier if we can make the first supposition) Great Britain had not recognised and conceded them, what then? Speculation as to the probable consequences is idle. But it is to be noted that this finding supports what has been the British contention all along—that in those acts which Russia in fact did, as well as in those alleged acts which Russia in fact did

not, there was no special reference (Ivan Petrof's forgeries out of the way) to fur-seals, or to fur-seal herds, or to fur-seal industries. The fur-seal was one of the many products of the territory and the islands, and Russia did what she could to let her subjects make money out of them. But, in truth, the solitary fact on which Mr. Phelps so much relied to make out his case of acquiescence was that pelagic sealing did not begin until after 1880. His inference that the sealers did not begin before because they knew they had no right to do it, and his argument that it was too late then to establish a right, were manifestly absurd; but to the suggestion of acquiescence from non-user, Lord Salisbury's answer seems all-sufficient:—"It is impossible to admit that a public right to fish, catch seals, or pursue any other lawful occupation on the high seas can be held to be abandoned by a nation from the mere fact that for a certain number of years it has not suited the subjects of that nation to exercise it." Indeed, the United States did not push their argument so far as they might have done if it had been sound. Had it been sound, all the other nations were already out of it, and Great Britain was the only one which stood in the way of their free and unfettered enjoyment of these fur-seal fisheries.

In the answer to the first part of the third question we meet absolute unanimity; the water now known as Behring Sea was included in the phrase "Pacific Ocean," as used in the Treaty of 1825 between Great Britain and Russia. But Senator Morgan again dissents from the otherwise unanimous answer to the second part of the question; that answer decides that no exclusive rights of jurisdiction or in the seal fisheries were held or exercised by Russia outside the three-mile limit after the Treaty of 1825. The first part of this question is the geographical form of the historical question propounded first; it need no longer detain us, and need never more trouble us; so the old maps may be folded up, and the Gazetteers may be put away. It is probably the last time they will be used to decide a question as to which there was so little doubt. And as to the second part of the question, its answer merely re-iterates what the first answer settled—Russia had no rights beyond such as were recognized by international law; she pretended to a great deal more, but abandoned the pretensions before the Treaty of 1825; therefore she neither held nor exercised any abnormal right," after said Treaty."

All these little matters being settled, we come again to a unanimously affirmative answer. All the rights of Russia as to jurisdiction, and as to the seal fisheries in Behring Sea east of the water-boundary, in the Treaty between the United States and Russia of March 30, 1867, did pass unimpaired to the United States under that Treaty. Senator Morgan's "Yes" means, however, rather more than that of his learned colleagues, by reason of his previous dissentient votes. Thus do history and geography fight in their courses against the United States; and the law is on our side too.

The legal question was thus propounded, as the United States argument

said, to "Arbitrators pre-eminent for their knowledge of law"—Has the United States any right, and, if so, what right, of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea when such seals are found outside the ordinary three-mile limit? Five of the Arbitrators have answered "No," and are in favour of Great Britain; the remaining two, Mr. Justice Harlan and Senator Morgan, have answered "Yes," and are in favour of the United States. This divergence of opinion is much to be regretted, for the law seemed (if, indeed the word "law" were used in its ordinary signification) and, with respect, still seems clear. But the decision of the Tribunal settles some points here also, it may be sincerely hoped, for ever and a day. It establishes as plain law the principles which the Attorney-General and Sir Richard Webster contended were applicable to wild animals, and which need not now be recapitulated. It establishes, further, that the fur-seal is an animal *ferœ naturæ*, and falls, therefore, within the bearing of these principles. It ruthlessly rejects all that chapter of natural history, that sentimental, overdrawn picture of the Pribylof farmyard, which the United States Counsel vied with one another in depictiug; it rejects it as a matter of fact, as unworthy of credit; it rejects it as a matter having no bearing on the law, even when much salt has reduced it to more probable dimensions. Let us hope, too, that it has made impossible in the future any dissertation on moral law and the law of nature, and that Puffendorf is laid to rest for ever, with all the fantastic arguments that men will build on what he wrote.

So much for the common law involved. But of far greater moment is the decision for the quietus which certain weird doctrines take which the United States tried hard to father on international law; it has killed them with a bare bodkin. It was, in all soberness, "with no mere idle use of high-sounding phrase" that Great Britain declared that she appeared "once more to vindicate the freedom of the sea." Was, then, the freedom of the sea in jeopardy? Yes, a thousand times yes. The right to come and go upon the high sea without let or hindrance, the right to take therefrom its produce, had been violated by the capture and confiscation of the Canadian sealing schooners, by the fines and imprisonment imposed on the Canadian fishermen. It was what Russia had tried to do in the days of Alexander—what, indeed, she would have done had not Great Britain, and the United States herself, stood in the breach. The false position from which Russia then immediately withdrew the United States now took up, and, strange to say, persisted in. And on what grounds? Because of the industry she had established on the shores of the Pribylof Islands, which the seals frequent. Herself rejecting, for the purpose of this argument, the claim of property in the seals, either individually or collectively, she claimed that the protection of that industry justified acts which were, in fact, "those acts of high authority which, by the law of nations, are allowed only to belligerents, or against pirates with whom

no nation is at peace." Great judges, and great statesmen echoing their words, on this side of the Atlantic and on that, have said that a violation of the freedom of the sea has led, and ever will lead, to war. Persistence in such a course leads to strife which no words can heal. A nation's rights upon the high sea in time of peace are *not* the same as those in time of war. And so this arbitrament is, in very deed, a victory for peace, and the lustre of its great renown will fall alike on those who gave the Award and on those who asked it and accept it.

And many other things are settled by the Award, but which, for your patience' sake and that of your readers, I dare not go into at length, but cannot entirely pass by. It disposes for good and all of that extraordinary contention of Mr. Phelps—that the "best international law has arisen from precedents that have been established when the just occasion for them arose, undeterred by the discussion of abstract and inadequate rules." When Philip is once more sober he will adopt again—nay, be the first to adopt—the only standard of international law known to nations—consent of nations: *placuitne gentibus?* The courteous lawyer, the elegant diplomatist will, it is certain, in future as in the past remind the young American citizen of what the American Envoys said in Paris near a century ago, and will assure him that the principle has been, and still is, too consecrated by use to be ignored:—"It follows, then, that the rights of England, being neither increased nor diminished by compact, remained precisely in their natural state, and were to be ascertained by some pre-existing acknowledged principle. This principle is to be searched for in the law of nations. That law forms, independent of compact, a rule of action by which the sovereignties of the civilized world consent to be governed. It prescribes what one nation may do without giving just cause of war, and what, of consequence, another may and ought to permit without being considered as having sacrificed its honour, its dignity, and independence."

And then the Award draws not the veriest ghost of an analogy from that extraordinary study in comparative legislation which Mr. Phelps initiated. Though the facts were so materially different from the present case of the seals, the great underlying analogy of principle, clear even to demonstration, he said, was this—that in every case of fishery legislation, whether it was on shore or at sea, there was an industry; in every case, whether on sea or shore, that industry was protected by legislation; here the effect, there the cause, and then the *sequitur*—Therefore, industries (industries valuable to the world, of which the industrials are trustees for mankind and themselves merely usufructuaries) may be protected by extra-territorial legislation applicable to subject (as a statute) and foreigner (as a "defensive regulation") alike. Is it necessary to point out the extraordinary confusion of what is merely incidental with what is the principal cause? Grant the existence of the industry, it is because, in one group of enactments (of which the Nor-

wegian law with its application to Varanger Fjord is an example), the waters affected by them are part of the realm that, among other things which are lawful, that industry may be protected. It is because, in another group (of which the Scotch Herring Fisheries Act and the Australasian Bêche de Mer Fisheries Act are examples), the power of the Sovereign extends over subjects on the high seas that, among other things which are lawful, acts injurious to that industry may be prohibited to them. It is, in a third group (which the Jan Mayen fisheries legislation illustrates), for the same reason that the industries of foreigners may be protected from injurious acts by subjects in return for the *quid pro quo*—the protection of the subjects' industry from injurious acts by foreigners. And it is because, in the last group (of which the protection of the Ceylon pearl fishery is the standing and orthodox example), of the occupation of the soil under the sea, not interfering with the navigation of the waters above, which the law recognizes, that the industry may be protected against injurious acts in the *locus in quo* by subjects and foreigners alike. In all these cases, which exhaust the examination of such laws, the "industry" may be the cause of the special legislative enactment; it is, however, but the concrete example of the validity of legislation dependent on the broader grounds of sovereignty, allegiance, and actual possession.

The Award disposes too of that other analogy drawn between the United States legislation and what are known as the "Hovering Acts;" it adopts the contention of the Attorney-General that, if these Acts are to be defended internationally at all, the principle involved in them is limited to vessels which are proceeding to a country with the express intention of violating the revenue laws of that country. They are what, indeed, they profess to be—"Acts for the prevention of smuggling." But even then they must be confined to a reasonable distance from the shore, and must be reasonable in the restrictions they impose.

So, too, the inference is rejected which Mr. Phelps attempted to draw from those historical cases which I have alluded to in a former letter—the case of Amelia Island, the case of the "Caroline," the punishment of the Pensacola Indians and the destruction of the forts on the Appalachicola River, the case of Greytown, and a host of others. They were cases of national might, not international right. The Attorney-General's argument is silently acquiesced in—the things which a nation *will* do, taking the risk of war, are not to be confused with the things which a nation *may* do. And this is the extent of that great but shadowy principle—the sacred right of self-defence.

And thus all the law of the case is disposed of in our favour. Yet we must still look forward to knowing at some future time the reasons for the dissent of the two learned Arbitrators appointed by the United States.

On the difficult and complicated question of regulations we find the three foreign Arbitrators and Lord Hannen forming a majority, Sir John Thompson

and the two American Arbitrators dissenting from the proposed scheme. A wide divergence of views was, perhaps, inevitable when it is remembered that consent naturally covered the whole body of regulations. A partial consent was, of course, impossible. The prohibition of the use of firearms tells indeed somewhat heavily against the Canadian sealer, and this regulation is not likely to meet with much favour in his eyes. But, in order to realize what the Award on this question of regulations means, it is very necessary not only for those who do not engage in pelagic sealing, but also for those who do, to look at them as a whole; and when this is done I think we can realise that our victory does not stop with the answers to the five questions, but runs all along the line. To understand this it is only necessary to recall the position which the United States took up on the subject of regulations. Their one and only demand was for the entire prohibition of pelagic sealing, not in Behring Sea alone but in the rest of the Pacific Ocean. They could ask nothing more, and nothing less would satisfy them. Pelagic sealing, they said, annihilated the seal, therefore the pelagic sealer must be annihilated. Now, in the first place, it is obvious that the pelagic sealer will not be annihilated by these regulations, and the inference is clear that the allegations of injury to the so-called herd were greatly exaggerated. Injury to the industry there might have been, but even this was exaggerated, and is quite another story. It is abundantly clear, therefore, that the regulation which the United States suggested was too palpably protective of the United States industry to be seriously considered after the right to it was negatived. Now what was the position taken up by Great Britain? The cardinal features of it were—a protected zone round the Pribylof islands, a close season, and the continuance of pelagic sealing. And these are the principles which have been acted on. The details which the majority of the Tribunal have finally adopted are not those which Great Britain suggested; but this cannot alter the fact that the principle she contended for was acquiesced in; and this for the day at least must be sufficient. And, further, it must be borne in mind that Behring Sea, save for the protected zone, is under the regulations what it has been declared to be by the answers to the five questions—an open sea and part of the Pacific Ocean.

The point chiefly to be criticised about the scheme is that the sealing on the islands remains unregulated; but, as I have pointed out in a previous letter, the Treaty did not permit the Tribunal to deal with it. It is to be regretted, however, that pressure should not have been brought to bear on the United States by making the close time in the Pacific conditional on the introduction of reasonable island regulations by the owners themselves. But the tribunal has not thought fit to adopt the suggestion; it has, however, made a special declaration and recommendation that as the regulations can only apply to the high sea, a supplementary body of regulations should be made applicable to land, with the concurrence of both Powers. The

recommendation is signed by all the Arbitrators, and it recognises the force of the British contention on this point. On the other hand, the close time does not begin till May 1, and, except in Behring Sea, shot-guns are not prohibited. It seems not improbable that when these regulations come to be re-considered at the end of five years the absence of prohibition on these two points may furnish a basis for another arrangement which shall be fully satisfactory to both parties. And when the matter comes to be, if it ever should be, re-discussed, the task of diplomacy will be the easier for the fact that the question has been lightened of all that superimposed mass of argument under which it has for so long travailed. As they stand the regulations cannot be other than eminently unsatisfactory to the United States, judged by the light of the arguments they thought fit to present to the Court.

But whether the award is satisfactory or not, the United States will without doubt loyally abide by it; and the Canadian sealers receiving compensation, we on our part shall not, as I say, shout *Væ victis*. For it is a peaceful, though a very notable, victory; and as there has been no strife of war, we shall not even sing a *Te Deum*. Congratulations to those who have fought so well for us, yes. But the case has even to-day passed into history.

AWARD OF THE TRIBUNAL OF ARBITRATION

CONSTITUTED

UNDER THE TREATY CONCLUDED AT WASHINGTON,

THE 29TH OF FEBRUARY, 1892,

Between the United States of America and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland.

WHEREAS, by a Treaty between the United States of America and Great Britain, signed at Washington, February 29, 1892, the ratifications of which by the Governments of the two Countries were exchanged at London on May the 7th, 1892, it was, amongst other things, agreed and concluded that the questions which had arisen between the Government of the United States of America and the Government of Her Britannic Majesty, concerning the jurisdictional rights of the United States in the waters of Behring's Sea, and concerning also the preservation of the fur-seal in or habitually resorting to the said sea, and the rights of the citizens and subjects of either Country as regards the taking of fur-seals in or habitually resorting to the said waters, should be submitted to a Tribunal of Arbitration to be composed of seven Arbitrators, who should be appointed in the following manner, that is to say: two should be named by the President of the United States; two should be named by Her Britannic Majesty; His Excellency the President of the French Republic should be jointly requested by the High Contracting Parties to name one; His Majesty the King of Italy should be so requested to name one; His Majesty the King of Sweden and Norway should be so requested to name one; the seven Arbitrators to be so named should be jurists of distinguished reputation in their respective Countries, and the selecting Powers should be requested to choose, if possible, jurists who are acquainted with the English language;

And whereas it was further agreed by Article II. of the said Treaty that the Arbitrators should meet at Paris within twenty days after the delivery of the Counter-Cases mentioned in Article IV.,

and should proceed impartially and carefully to examine and decide the questions which had been or should be laid before them as in the said Treaty provided on the part of the Governments of the United States and of Her Britannic Majesty respectively, and that all questions considered by the Tribunal, including the final decision, should be determined by a majority of all the Arbitrators;

And whereas by Article VI. of the said Treaty, it was further provided as follows: "In deciding the matters submitted to the said Arbitrators, it is agreed that the following five points shall be submitted to them in order that their award shall embrace a distinct decision upon each of said five points, to wit:

"1. What exclusive jurisdiction in the sea now known as the Behring's Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

"2. How far were these claims of jurisdiction as to the seal fisheries recognised and conceded by Great Britain?

"3. Was the body of water now known as the Behring Sea included in the phrase *Pacific Ocean*, as used in the Treaty of 1825 between Great Britain and Russia; and what rights, if any, in the Behring Sea were held and exclusively exercised by Russia after said Treaty?

"4. Did not all the rights of Russia as to jurisdiction and as to the seal fisheries in Behring Sea east of the water boundary, in the Treaty between the United States and Russia of the 30th of March, 1867, pass unimpaired to the United States under that Treaty?

"5. Has the United States any right, and if so, what right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea when such seals are found outside the ordinary three-mile limit?"

And whereas, by Article VII. of the said Treaty, it was further agreed as follows:

"If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of Regulations for the proper protection and preservation of the fur-seal in, or habitually resorting to, the Behring Sea, the Arbitrators shall then determine what concurrent Regulations, outside the jurisdictional limits of the respective

Governments, are necessary, and over what waters such Regulations should extend;

"The High Contracting Parties futhermore agree to co-operate in securing the adhesion of other Powers to such Regulations;"

And whereas, by Article VIII. of the said Treaty, after reciting that the High Contracting Parties had found themselves unable to agree upon a reference which should include the question of the liability of each for the injuries alleged to have been sustained by the other, or by its citizens, in connection with the claims presented and urged by it, and that "they were solicitous that this subordinate question should not interrupt or longer delay the submission and determination of the main questions," the High Contracting Parties agreed that "either of them might submit to the Arbitrators any question of fact involved in said claims and ask for a finding thereon, the question of the liability of either Government upon the facts found to be the subject of further negotiation;"

And whereas the President of the United States of America named The Honourable JOHN M. HARLAN, Justice of the Supreme Court of the United States, and The Honourable JOHN T. MORGAN, Senator of the United States, to be two of the said Arbitrators, and Her Britannic Majesty named The Right Honourable LORD HANNEN and The Honourable Sir JOHN THOMPSON, Minister of Justice and Attorney-General for Canada, to be two of the said Arbitrators, and His Excellency the President of the French Republic named the Baron DE COURCEL, Senator, Ambassador of France, to be one of the said Arbitrators, and His Majesty the King of Italy named the Marquis EMILIO VISCONTI VENOSTA, former Minister of Foreign Affairs and Senator of the Kingdom of Italy, to be one of the said Arbitrators, and His Majesty the King of Sweden and Norway named Mr. GREGERS GRAM, Minister of State, to be one of the said Arbitrators;

And whereas We, the said Arbitrators, so named and appointed, having taken upon ourselves the burden of the said Arbitration, and having duly met at Paris, proceeded impartially and carefully to examine and decide all the questions submitted to us the said Arbitrators, under the said Treaty, or laid before us as provided in the said Treaty on the part of the Governments of Her Britannic Majesty and the United States respectively;

NOW WE, the said Arbitrators, having impartially and carefully examined the said questions, do in like manner by this our Award decide and determine the said questions in manner following, that is to say, we decide and determine as to the five points mentioned in Article VI. as to which our Award is to embrace a distinct decision upon each of them:

As to the first of the said five points, We, the said Baron DE COURCEL, Mr. Justice HARLAN, Lord HANNEN, Sir JOHN THOMPSON, Marquis VISCONTI VENOSTA and Mr. GREGERS GRAM, being a majority of the said Arbitrators, do decide and determine as follows:

By the Ukase of 1821, Russia claimed jurisdiction in the sea now known as the Behring Sea to the extent of 100 Italian miles from the coasts and islands belonging to her, but, in the course of the negotiations which led to the conclusion of the Treaties of 1824 with the United States, and of 1825 with Great Britain, Russia admitted that her jurisdiction in the said sea should be restricted to the reach of cannon shot from shore, and it appears that, from that time up to the time of the cession of Alaska to the United States, Russia never asserted in fact or exercised any exclusive jurisdiction in Behring Sea, or any exclusive rights in the seal fisheries therein beyond the ordinary limit of territorial waters.

As to the second of the said five points, We, the said Baron DE COURCEL, Mr. Justice HARLAN, Lord HANNEN, Sir JOHN THOMPSON, Marquis VISCONTI VENOSTA and Mr. GREGERS GRAM, being a majority of the said Arbitrators, do decide and determine that Great Britain did not recognize or concede any claim, upon the part of Russia, to exclusive jurisdiction as to the seal fisheries in Behring Sea, outside of ordinary territorial waters.

As to the third of the said five points, as to so much thereof as requires us to decide whether the body of water now known as the Behring Sea was included in the phrase "Pacific Ocean" as used in the Treaty of 1825 between Great Britain and Russia, We, the said Arbitrators, do unanimously decide and determine that the body of water now known as the Behring Sea was included in the phrase "Pacific Ocean" as used in the said Treaty.

And as to so much of the said third point as requires us to decide what rights, if any, in the Behring Sea were held and exclusively exercised by Russia after the said Treaty of 1825, We, the said Baron DE COURCEL, Mr. Justice HARLAN, Lord

HANNEN, Sir JOHN THOMPSON, Marquis VISCONTI VENOSTA and Mr. GREGERS GRAM, being a majority of the said Arbitrators, do decide and determine that no exclusive rights of jurisdiction in Behring Sea and no exclusive rights as to the seal fisheries therein, were held or exercised by Russia outside of ordinary territorial waters after the Treaty of 1825.

As to the fourth of the said five points, We, the said Arbitrators, do unanimously decide and determine that all the rights of Russia as to jurisdiction and as to the seal fisheries in Behring Sea, east of the water boundary, in the Treaty between the United States and Russia of the 30th March 1867, did pass unimpaired to the United States under the said Treaty.

As to the fifth of the said five points, We, the said Baron DE COURCEL, Lord HANNEN, Sir JOHN THOMPSON, Marquis VISCONTI VENOSTA and Mr. GREGERS GRAM being a majority of the said Arbitrators, do decide and determine that the United States has not any right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary three-mile limit.

And whereas the aforesaid determination of the foregoing questions as to the exclusive jurisdiction of the United States mentioned in Article VI. leaves the subject in such a position that the concurrence of Great Britain is necessary to the establishment of Regulations for the proper protection and preservation of the fur-seal in or habitually resorting to the Behring Sea, the Tribunal having decided by a majority as to each Article of the following Regulations, We, the said Baron DE COURCEL, Lord HANNEN, Marquis VISCONTI VENOSTA, and Mr. GREGERS GRAM, assenting to the whole of the nine Articles of the following Regulations, and being a majority of the said Arbitrators, do decide and determine in the mode provided by the Treaty, that the following concurrent Regulations outside the jurisdictional limits of the respective Governments are necessary and that they should extend over the waters hereinafter mentioned, that is to say:

ARTICLE 1.

The Governments of the United States and of Great Britain shall forbid their citizens and subjects respectively to kill, capture

or pursue at any time and in any manner whatever, the animals commonly called fur-seals, within a zone of sixty miles around the Pribilov Islands, inclusive of the territorial waters.

The miles mentioned in the preceding paragraph are geographical miles, of sixty to a degree of latitude.

ARTICLE 2.

The two Governments shall forbid their citizens and subjects respectively to kill, capture or pursue, in any manner whatever, during the season extending, each year, from the 1st of May to the 31st of July, both inclusive, the fur-seals on the high sea, in the part of the Pacific Ocean, inclusive of the Behring Sea, which is situated to the North of the 35th degree of North latitude, and eastward of the 180th degree of longitude from Greenwich till it strikes the water boundary described in Article I of the Treaty of 1867 between the United States and Russia, and following that line up to Behring Straits.

ARTICLE 3.

During the period of time and in the waters in which the fur-seal fishing is allowed, only sailing vessels shall be permitted to carry on or take part in fur-seal fishing operations. They will however be at liberty to avail themselves of the use of such canoes or undecked boats, propelled by paddles, oars, or sails as are in common use as fishing-boats.

ARTICLE 4.

Each sailing vessel authorised to fish for fur-seals must be provided with a special licence issued for that purpose by its Government and shall be required to carry a distinguishing flag to be prescribed by its Government.

ARTICLE 5.

The masters of the vessels engaged in fur-seal fishing shall enter accurately in their official log-book the date and place of each fur-seal fishing operation, and also the number and sex of the seals captured upon each day. These entries shall be communicated by each of the two Governments to the other at the end of each fishing season.

ARTICLE 6.

The use of nets, firearms and explosives shall be forbidden in the fur-seal fishing. This restriction shall not apply to shot guns when such fishing takes place outside of Behring Sea, during the season when it may be lawfully carried on.

ARTICLE 7.

The two Governments shall take measures to control the fitness of the men authorized to engage in fur-seal fishing; these men shall have been proved fit to handle with sufficient skill the weapons by means of which this fishing may be carried on.

ARTICLE 8.

The regulations contained in the preceding articles shall not apply to Indians dwelling on the coasts of the territory of the United States or of Great Britain, and carrying on fur-seal fishing in canoes or undecked boats not transported by or used in connection with other vessels and propelled wholly by paddles, oars or sails, and manned by not more than five persons each in the way hitherto practised by the Indians, provided such Indians are not in the employment of other persons and provided that, when so hunting in canoes or undecked boats, they shall not hunt fur-seals outside of territorial waters under contract for the delivery of the skins to any person.

This exemption shall not be construed to affect the Municipal law of either country, nor shall it extend to the waters of Behring Sea or the waters of the Aleutian Passes.

Nothing herein contained is intended to interfere with the employment of Indians as hunters or otherwise in connection with fur-sealing vessels as heretofore.

ARTICLE 9.

The concurrent regulations hereby determined with a view to the protection and preservation of the fur-seals, shall remain in force until they have been, in whole or in part, abolished or modified by common agreement between the Governments of the United States and of Great Britain.

The said concurrent regulations shall be submitted every five years to a new examination, so as to enable both interested Govern-

ments to consider whether, in the light of past experience, there is occasion for any modification thereof.

And whereas the Government of Her Britannic Majesty did submit to the Tribunal of Arbitration by Article VIII. of the said Treaty certain questions of fact involved in the claims referred to in the said Article VIII., and did also submit to us, the said Tribunal, a statement of the said facts, as follows, that is to say:

"Findings of fact proposed by the Agent of Great Britain and agreed to as proved by the Agent for the United States, and submitted to the Tribunal of Arbitration for its consideration."

"1. That the several searches and seizures, whether of ships or goods, and the several arrests of masters and crews, respectively mentioned in the Schedule to the British Case, pages 1 to 60 inclusive, were made by the authority of the United States Government. The questions as to the value of the said vessels or their contents or either of them, and the question as to whether the vessels mentioned in the Schedule to the British Case, or any of them, were wholly or in part the actual property of citizens of the United States, have been withdrawn from and have not been considered by the Tribunal, it being understood that it is open to the United States to raise these questions or any of them, if they think fit, in any future negotiations as to the liability of the United States Government to pay the amounts mentioned in the Schedule to the British Case.

"2. That the seizures aforesaid, with the exception of the 'Pathfinder' seized at Neah Bay, were made in Behring Sea at the distances from shore mentioned in the Schedule annexed hereto marked 'C.'

"3. That the said several searches and seizures of vessels were made by public armed vessels of the United States, the commanders of which had, at the several times when they were made, from the Executive Department of the Government of the United States, instructions, a copy of one of which is annexed hereto, marked 'A,' and that the others were, in all substantial respects, the same: that in all the instances in which proceedings were had in the District Courts of the United States resulting in condemnation,

such proceedings were begun by the filing of libels, a copy of one of which is annexed hereto, marked 'B,' and that the libels in the other proceedings were in all substantial respects the same: that the alleged acts or offences for which said several searches and seizures were made were in each case done or committed in Behring Sea at the distances from shore aforesaid; and that in each case in which sentence of condemnation was passed, except in those cases when the vessels were released after condemnation, the seizure was adopted by the Government of the United States: and in those cases in which the vessels were released the seizure was made by the authority of the United States; that the said fines and imprisonments were for alleged breaches of the municipal laws of the United States, which alleged breaches were wholly committed in Behring Sea at the distances from the shore aforesaid;

"4. That the several orders mentioned in the Schedule annexed hereto and marked 'C' warning vessels to leave or not to enter Behring Sea were made by public armed vessels of the United States, the commanders of which had, at the several times when they were given, like instructions as mentioned in finding 3, and that the vessels so warned were engaged in sealing or prosecuting voyages for that purpose, and that such action was adopted by the Government of the United States;

"5. That the District Courts of the United States in which any proceedings were had or taken for the purpose of condemning any vessel seized as mentioned in the Schedule to the Case of Great Britain, pages 1 to 60, inclusive, had all the jurisdiction and powers of Courts of Admiralty, including the prize jurisdiction, but that in each case the sentence pronounced by the Court was based upon the grounds set forth in the libel."

"ANNEX A.

"Treasury Department, Office of the Secretary, Washington.
"*April* 21*st*, 1886.

"SIR,—Referring to Department letter of this date, directing you to proceed with the revenue-steamer *Bear*, under your command, to the seal Islands, &c., you are hereby clothed with full power to enforce the law contained in the provisions of Section 1956 of the United States' Revised Statutes, and directed to seize all vessels, and arrest and deliver to the proper authorities any or all persons whom you may detect violating the law referred to, after due notice shall have been given.

"You will also seize any liquors or fire-arms attempted to be introduced

into the country without proper permit, under the provisions of Section 1955 of the Revised Statutes, and the Proclamation of the President dated 4th February, 1870.

"Respectfully yours,

"Signed, C. S. FAIRCHILD,

"*Acting Secretary.*

"*Captain M. A. Healy, commanding revenue-steamer Bear, San Francisco, California.*"

"ANNEX B.

"IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.—AUGUST SPECIAL TERM, 1886.

"To the Honourable Lafayette Dawson, Judge of said District Court:

"The libel of information of M. D. Ball, Attorney for the United States for the District of Alaska, who prosecutes on behalf of said United States, and being present here in Court in his proper person, in the name and on behalf of the said United States, against the schooner *Thornton*, her tackle, apparel, boats, cargo, and furniture, and against all persons intervening for their interest therein, in a cause of forfeiture, alleges and informs as follows:

"That Charles A. Ahbey, an officer in the Revenue Marine Service of the United States, and on special duty in the waters of the district of Alaska, heretofore, to wit, on the 1st day of August, 1886, within the limits of Alaska Territory, and in the waters thereof, and within the civil and judicial district of Alaska, to wit, within the waters of that portion of Behring Sea belonging to the said district, on waters navigable from the sea by vessels of 10 or more tons burden, seized the ship or vessel commonly called a schooner, the *Thornton*, her tackle, apparel, boats, cargo, and furniture, being the property of some person or persons to the said Attorney unknown, as forfeited to the United States, for the following causes:

"That the said vessel or schooner was found engaged in killing fur-seal within the limits of Alaska Territory, and in the waters thereof, in violation of section 1956 of the Revised Statutes of the United States.

"And the said Attorney saith that all and singular the premises are and were true, and within the Admiralty and Maritime jurisdiction of this Court, and that by reason thereof, and by force of the Statutes of the United States in such cases made and provided, the afore-mentioned and described schooner or vessel, being a vessel of over 20 tons burden, her tackle, apparel, boats, cargo, and furniture, became and are forfeited to the use of the said United States, and that said schooner is now within the district aforesaid.

"Wherefore the said Attorney prays the usual process and monition of this honourable Court issue in this behalf, and that all persons interested in the before-mentioned and described schooner or vessel may be cited in general and special to answer the premises, and all due proceedings being had, that the said schooner or vessel, her tackle, apparel, boats, cargo, and furniture may, for the cause aforesaid, and others appearing, be condemned by the definite sentence and decree of this honourable Court, as forfeited to the use of the said United States, according to the form of the Statute of the said United States in such cases made and provided.

"Signed, M. D. BALL,

"United States District Attorney for the District of Alaska."

"ANNEX C.

"The following Table shows the names of the British sealing-vessels seized or warned by United States revenue cruisers 1886–1890, and the approximate distance from land when seized. The distances assigned in the cases of the *Carolena*, *Thornton* and *Onward* are on the authority of U.S. Naval Commander Abbey (see 50th Congress, 2nd Session, Senate Executive Documents No. 106, pp. 20, 30, 40). The distances assigned in the cases of the *Anna Beck*, *W. P. Sayward*, *Dolphin* and *Grace* are on the authority of Captain Shepard, U.S.R.M. (*Blue Book*, United States No. 2, 1890, pp. 80–82. See Appendix, vol. III.)."

Name of Vessels.	Date of Seizure.	Approximate Distance from land when seized.	U.S. Vessel making seizure.
Carolena	August 1, 1886	75 miles	*Corwin.*
Thornton	August 1, 1886	70 miles	*Corwin.*
Onward.....	August 2, 1886	115 miles	*Corwin.*
Favourite	August 2, 1886	Warned by *Corwin* in about same position as *Onward.*	
Anna Beck ...	July 2, 1887	66 miles	*Rush.*
W. P. Sayward	July 9, 1887	59 miles	*Rush.*
Dolphin	July 12, 1887	40 miles	*Rush.*
Grace	July 17, 1887	96 miles	*Rush.*
Alfred Adams.	August 10, 1887	62 miles	*Rush.*
Ada	August 25, 1887	15 miles	*Bear.*
Triumph	August 4, 1887	Warned by *Rush* not to enter Behring Sea.	
Juanita.....	July 31, 1889	66 miles	*Rush.*
Pathfinder ...	July 29, 1889	50 miles	*Rush.*
Triumph.....	July 11, 1889	Ordered out of Behring Sea by *Rush.* (?) As to position when warned.	
Black Diamond	July 11, 1889	35 miles	*Rush.*
Lily.....	August 6, 1889	66 miles	*Rush.*
Ariel	July 30, 1889	Ordered out of Behring Sea by *Rush.*	
Kate	August 13, 1889	*Ditto.*	
Minnie	July 15, 1889	65 miles	*Rush.*
Pathfinder ...	March 27, 1890	Seized in Neah Bay[1]....	*Corwin.*

[1] Neah Bay is in the State of Washington, and the *Pathfinder* was seized there on charges made against her in Behring Sea in the previous year. She was released two days later.

And whereas the Government of Her Britannic Majesty did ask the said Arbitrators to find the said facts as set forth in the said statement, and whereas the Agent and Counsel for the United States Government thereupon in our presence informed us that the said statement of facts was sustained by the evidence, and that they had agreed with the Agent and Counsel for Her Britannic Majesty that We, the Arbitrators, if we should think fit so to do might find the said statements of facts to be true.

Now We, the said Arbitrators, do unanimously find the facts as set forth in the said statement to be true.

And whereas each and every question which has been considered by the Tribunal has been determined by a majority of all the Arbitrators:

NOW WE, Baron de COURCEL, Lord HANNEN, Mr. Justice HARLAN, Sir JOHN THOMPSON, Senator MORGAN, the Marquis VISCONTI VENOSTA and Mr. GREGERS GRAM, the respective minorities not withdrawing their votes, do declare this to be the final Decision and Award in writing of this Tribunal in accordance with the Treaty.

Made in duplicate at Paris and signed by us the fifteenth day of August in the year 1893.

And We do certify this English Version thereof to be true and accurate.

ALPH. DE COURCEL.
JOHN M. HARLAN.
JOHN T. MORGAN.
HANNEN.
J. THOMPSON.
VISCONTI VENOSTA.
G. GRAM.

DECLARATIONS

MADE BY THE TRIBUNAL OF ARBITRATION

and referred to the Governments of the United States and Great Britain for their consideration.

I.

The Arbitrators declare that the concurrent Regulations, as determined upon by the Tribunal of Arbitration, by virtue of Article VII. of the Treaty of the 29th of February, 1892, being applicable to the high sea only, should, in their opinion, be supplemented by other Regulations applicable within the limits of the sovereignty of each of the two Powers interested and to be settled by their common agreement.

II.

In view of the critical condition to which it appears certain that the race of fur-seals is now reduced in consequence of circumstances not fully known, the Arbitrators think fit to recommend both Governments to come to an understanding in order to prohibit any killing of fur-seals, either on land or at sea, for a period of two or three years, or at least one year, subject to such exceptions as the two Governments might think proper to admit of.

Such a measure might be recurred to at occasional intervals if found beneficial.

III.

The Arbitrators declare moreover that, in their opinion, the carrying out of the Regulations determined upon by the Tribunal

of Arbitration, should be assured by a system of stipulations and measures to be enacted by the two Powers; and that the Tribunal must, in consequence, leave it to the two Powers to decide upon the means for giving effect to the Regulations determined upon by it.

We do certify this English version to be true and accurate, and have signed the same at Paris this 15th day of August, 1893.

ALPH. DE COURCEL.
JOHN M. HARLAN.
JOHN T. MORGAN.

I approve of Declarations I. and III.

HANNEN.

I approve of Declarations I. and III.

J. THOMPSON.
VISCONTI VENOSTA.
G. GRAM.

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